# RECLAIMING A CONTEXTUALIZED APPROACH TO THE RIGHT TO STATE-FUNDED COUNSEL IN CHILD PROTECTION CASES

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## INTRODUCTION

In Canadian courtrooms where child protection applications are heard, it is still common to find parents trying to respond to those applications without the assistance of legal counsel, which they believe they cannot afford. This despite the fact that a right to state-funded counsel in child protection cases, when necessary to ensure a fair trial, was recognized under the *Charter* by the Supreme Court in 1999 in the ground-breaking case of *New Brunswick v. G.(J.)*.[1] That decision prompted reviews of legal aid plans across the country, many of which had totally excluded child

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[1] *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 [*G(J)*].

protection matters, and so produced something of a systemic improvement to the plight of unrepresented parents. However, income-eligibility cut-offs for legal aid in child protection matters have remained relatively low, especially given the constant unmatched increases in cost-of-living. Moreover, in many provinces, there have been significant general cuts to legal aid funding since *G.(J)*. Consequently, there remain parents involved in child protection matters who are not eligible for legal aid counsel but who cannot, at least in their own assessment, afford to pay for counsel themselves. The *G.(J.)* right to state-funded counsel therefore continues to be relevant and to be claimed. Our review of reported cases reveals that these claims are often unsuccessful and the purpose of this article is to critically analyze the approach of courts to these claims. Ultimately, we identify and defend a contextualized, less restrictive approach to state-funded counsel claims.

The analysis which follows addresses a variety of issues that need further attention in developing a contextualized approach. Our analysis focuses on the most significant element of the test for obtaining state-funded counsel, namely, establishing indigence or, in other words, an inability to afford to pay for counsel. One of the most significant issues relating to indigency is the potential assimilation of the test for eligibility for state-funded counsel in child protection cases to the test used for state-funded counsel claims in criminal cases. When establishing the right to state-funded counsel in child protection cases in *G.(J.)*, the Supreme Court of Canada trod a path parallel to the Ontario Court of Appeal in *R. v. Rowbotham*,[2] which had earlier established a right to state-funded counsel in a criminal context. In subsequent decisions in both contexts, judges have struggled with how 'strict' to be in assessing eligibility, especially in relation to assessing 'indigency'. Until recently, the approach taken in child protection cases has been restrictive both in terms of the definition of indigency and in terms of procedural strictness. This approach echoes and in some cases even adopts the restrictive approach taken in a number of criminal cases. In 2009, the restrictive approach was questioned and resisted at the trial level of a child protection matter, *British Columbia (Director of Child, Family and Community Service) v. T.L.*,[3] and the approach taken was upheld on appeal. Moreover, last year, the Ontario Court of Appeal itself questioned the strictness that had come to characterize many applications of the *Rowbotham* test. In different ways, these two recent decisions raise questions about the use of the restrictive approach in child protection cases.

In our view, any move towards more restrictiveness in child protection matters is misguided. Instead, the fresh approach offered by *T.L.* ought to be

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[2] *R v Rowbotham* (1988), 41 CCC (3d) 1, 1988 CanLII 147 (ON CA) [*Rowbotham*]. In *G(J), supra* note 1, the Supreme Court refrained from commenting on the correctness of the Ontario Court of Appeal's decision in *Rowbotham*, but used similar reasoning.

[3] *British Columbia (Director of Child, Family and Community Service) v TL*, 2009 BCPC 293, [2009] BCJ No 1851 [*TL*].

followed and, indeed, enhanced. In the final section of this paper, we offer an outline of a contextualized and consequently less restrictive approach to claims for state-funded counsel in child protection matters. Our opposition to the more restrictive approach is based on an assessment of the legal, social and judicial context of child protection matters. We advance our argument in two main parts. In the first part, we review the *G.(J.)* decision establishing the right to state-funded counsel in child protection cases and then provide an overview of issues of concern arising from subsequent cases. We then review the *T.L.* decision and approach. This provides a framework of issues for consideration in the second part of the paper, which begins with a critical assessment of the tendency to a restrictive approach. Our critical assessment discusses divergent approaches in the criminal context, revealing the recent rejection of the more restrictive approach, and also compares and contrasts the degree of legal protection offered to parents in child protection proceedings as compared to accused in criminal proceedings. We then address the social context of child protection, the relevance of legal aid eligibility criteria as benchmarks for ability to pay for counsel, and the broader issue of the responsibility of judges to ensure fair hearings. Based on this, we articulate a contextualized approach to state-funded counsel, informed by *T.L.*

## 1. State-funded Counsel in Child Protection Cases

### (A) Origins: *G.(J.)*

The right to state-funded counsel in child protection proceedings established in *G.(J.)* is grounded in s. 7 of the *Charter*, which provides that no person may be deprived of their rights to life, liberty or security of the person except in accordance with the principles of fundamental justice. The Court held that a claim to state-funding of counsel can only succeed if the applicant – in the context of child protection, typically a parent – can show all of the following:

1. The proceedings may have a detrimental impact on the parent's life, liberty or security of the person;
2. A lack of counsel for the parent in the proceedings would violate the principles of fundamental justice due to (a) the seriousness of the interests at stake, (b) the complexity of the proceedings and, (c) the capacities of the parent; and
3. The parent is indigent – that is, cannot afford to pay for counsel themselves.[4]

In establishing and applying this test, the Court held that a parent's security of the person is jeopardized by child protection proceedings because the parent's relationship with his or her child may be restricted or denied by the proceedings.

[4] *G(J), supra* note 1.

Given this holding, in moving on to the second factor, the Court did not hesitate in finding that the interests at stake were "of the highest order."[5] This was especially so once the potential impact on the child was taken into account. The Court made a number of findings relating to the particular context of child protection proceedings and the parents involved in these proceedings. The Court held that child protection proceedings are essentially adversarial court proceedings that place significant responsibility on parties for planning and presenting their own cases in accordance with specialized rules of evidence and procedure. These rules constitute a "foreign environment"[6] for many people. This inherent complexity is then exacerbated by the "significant emotional strain" any parent is likely to be under, as well as the fact that the child protection authority will be represented by counsel. In addition, noted the Court, the instant hearing was to last a number of days and involved significant amounts of evidence, including expert witnesses. As for the capacities of the parent (or other applicants), the Court held that this goes beyond merely possessing the equivalent of competence to stand trial on criminal charges. Rather, "the parent must be able to participate meaningfully at the hearing, which goes beyond mere ability to understand the case and communicate."[7] Given the seriousness and complexity of the proceedings, "an unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case."[8] Ultimately, according to the Court, the question is whether the child protection hearing will be fair to the parent, if self-represented and, as importantly, to the child(ren), given that the fundamental principle of child protection proceedings is the best interests of the child.[9] At the same time, the Court also mentioned that consideration needs to be given to the extent to which a judge can mitigate any unfairness by assisting a self-represented parent, within the limits of the judicial role.

In *G.(J.)* the applicant was in receipt of social assistance and so her indigency was uncontested and this aspect of the test was not elaborated. However, the Court did say that judges facing applications for state-funded counsel should first inquire as to whether the applicant has applied for legal aid or any other form of state-funded legal assistance. If all possible avenues of state-funding have not been exhausted, the proceedings should be adjourned to allow the parent a reasonable amount of time to pursue them, but subject to the best interests of the child in a timely resolution of the case.

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[5] *Ibid*, at para 76.

[6] *Ibid*, at para 79.

[7] *Ibid*, at para 83.

[8] *Ibid*, at para 80.

[9] *Ibid*, at para 83.

Although the Court was unanimous in its judgment, both Chief Justice Lamer and Justice L'Heureux-Dubé wrote judgments. Justice L'Heureux-Dubé sought to give prominence to a variety of contextual issues that could inform subsequent application of the test for state-funded counsel. To begin with, she emphasized that the case implicated issues of gender equality and the s. 15 equality guarantee. An alternative claim based on s.15 had been rejected by the lower courts. Although the s. 15 argument was not raised at the Supreme Court, Justice L'Heureux-Dubé took the position that, at a minimum, the interpretation of the s. 7 right needed to be informed by the fact that child protection proceedings disproportionately affect women and, moreover, women from otherwise disadvantaged and vulnerable groups.

Justice L'Heureux-Dubé also warned against collapsing the preliminary assessment of the participatory capacity of the parent into the subsequent substantive assessment of his or her parenting capacity. In her view, courts needed to be careful about keeping the criteria for each capacity distinct and make sure that a holding of a lack of capacity to effectively participate in child protection proceedings was not held against the parent in assessing his or her parenting capacity.

In addition, Justice L'Heureux-Dubé made a point of stating that, given the criteria for establishing an entitlement to state-funded counsel, and given the disproportionate involvement of disadvantaged people in child protection proceedings, "it is likely that the situations in which counsel will be required will not necessarily be rare."[10] Although this point reads almost as if it were a riposte, it should be noted that Chief Justice Lamer does not directly state that the right should only be expected to be upheld in rare or exceptional circumstances. Despite this, some subsequent cases have treated the right as being framed by such an expectation of rarity. This framing appears to have been drawn from the Ontario Court of Appeal's decision in *Rowbotham*, where a defendant in a complex drug trafficking case, who had been denied legal aid because her income was above the financial eligibility cut-off, had her charges stayed on the basis that ss. 7 and 11(d) of the *Charter* required her to be provided with counsel. The court stated,

> [T]he finding of legal aid officials that an accused has the means to employ counsel is entitled to the greatest respect. Nevertheless, there may be rare circumstances in which legal aid is denied but the trial judge, after an examination of the means of the accused, because of the length or complexity of the proceedings or for other reasons, cannot afford to retain counsel to the extent necessary to ensure a fair trial.[11]

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[10] *Ibid*, at para. 125.

[11] *Rowbotham, supra* note 2 at 35.

In *G.(J.)*, Chief Justice Lamer did mention *Rowbotham*, but only to note that it had also identified the seriousness of the interests at stake and the complexity of the proceedings as relevant factors. Indeed, he made specific reference to the need to consider the elements of fundamental justice on a case-by-case basis, acknowledging that the participatory capacity of parents may be lacking due to limited education and difficulty with communication (especially in a courtroom context).

However, over time, some lower courts have sought to assimilate the tests for state-funded counsel in the civil and criminal contexts and, in doing so, have enveloped the *G.(J.)* test with the framing expectation of rarity. As will be discussed in what follows, whether or not this framing is justifiable, it cannot be justified as having originated from *G.(J.)*. Indeed, given Justice L'Heureux-Dubé's judgment, quite the opposite is true. We also note that the Ontario Court of Appeal's reference to "rare circumstances" in *Rowbotham* should be read in the context of the significantly more generous legal aid regime in place at the time the case was decided, as will be discussed in section 2.(A) i. below.

One interesting element in the *G.(J.)* decision is Chief Justice Lamer's explanation of his apparent reversal from his conclusion in *R. v. Prosper*[12] regarding the right to state-funded counsel and the court's role in second-guessing legal aid decisions. *Prosper* considered whether a 24-hour duty counsel service was required under the *Charter* for those detained in criminal investigations. In his decision for the majority, Chief Justice Lamer noted that a provision that would expressly require state-funded counsel for those unable to afford counsel was considered and rejected by the *Charter* framers. He found this to be significant in determining that s. 10(b) of the *Charter* did not guarantee state-funded duty counsel. He also referred to the undesirability of imposing on governments a positive right to expend public resources by recognizing such a right under s. 10 of the *Charter*:

> [I]t would be a very big step for this Court to interpret the *Charter* in a manner which imposes a positive constitutional obligation on governments. The fact that such an obligation would almost certainly interfere with governments' allocation of limited resources by requiring them to expend public funds on the provision of a service is, I might add, a further consideration which weighs against this interpretation.[13]

In *G.(J.)*, the Chief Justice dealt with this precedent as follows:

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[12] *R v Prosper*, [1994] 3 SCR 236 [*Prosper*].

[13] *Ibid*, at 37 per Lamer CJC.

> The omission of a positive right to state-funded counsel in s 10, which, as I said in *Prosper*, should be accorded some significance, does not preclude an interpretation of s. 7 that imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing. To hold otherwise would be to suggest that the principles of fundamental justice do not guarantee the right to a fair hearing or, alternatively, that under no circumstances would the requirements of a fair hearing obligate governments to pay for an individual to be represented by counsel. Both of these positions are untenable. In my view, the significance of the omission of a positive right to state-funded counsel under s. 10 is that s. 7 should not be interpreted as providing an absolute right to state-funded counsel at all hearings where an individual's life, liberty, and security is at stake and the individual cannot afford a lawyer. Accordingly, while a blanket right to state-funded counsel does not exist under s. 10, a limited right to state-funded counsel arises under s. 7 to ensure a fair hearing in the circumstances I have outlined above.[14]

Chief Justice Lamer also noted that his concerns regarding the interference with governments' allocation of limited resources that would be caused by recognition of a positive right to counsel under the *Charter* had been addressed under s. 1. In terms of the section 1 analysis, the decisive factor for the Court was that the deleterious impact of not providing state-funded counsel to parents in child protection proceedings far outweighed any beneficial effect on the government's fiscal position from the relatively minor budgetary savings.

**(B) Subsequent Claims and Concerns:**

In at least a partial response to *G.(J.)*, provincial legal aid plans across Canada now include child protection proceedings among the types of cases eligible for legal aid funding of counsel.[15] The public reports of legal aid programs do not provide sufficient detail to determine exactly what proportion of funding is devoted to child protection matters.[16] Certainly though, legal aid plays an important role in providing funding for counsel for parents who could not otherwise afford representation. At the same time, however, and as will be discussed in more depth in section 2.(B), below, the financial eligibility criteria for legal aid are quite strict and the maximum allowable income for eligibility is very low.

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[14] *G(J), supra* note 1 at para 107.

[15] The most recent Department of Justice national surveys of legal aid plans, which indicate national coverage for child protection matters, appear to be from 2002, as follows: Canada, Department of Justice, A Profile of Legal Aid Services in Family Law Matters in Canada (Ottawa: Research and Statistics Division, 2002); Canada, Department of Justice, Legal Aid Eligibility and Coverage in Canada (Ottawa: Research and Statistics Division, 2002).

[16] Some information has been released to the Department of Justice for the national surveys, *ibid.*

Consequently, many parents who live below the poverty line, or could otherwise be described as 'working poor', are ineligible for legal aid and do not believe they can afford to pay for a lawyer themselves. These parents are the most significant group of those potentially eligible for state-funding of counsel under *G.(J.)*. Another group consists of the parents who were granted legal aid funding of counsel for the process culminating in a trial level hearing, but who are denied funding of counsel for an appeal.[17] A final group are relatives (e.g. grandparents) or other people who have a relationship with the child(ren) and, though not recognized as the parents of the child(ren), seek to participate in the child protection proceedings, but cannot afford private counsel.

It is difficult to quantify the number or proportion of parents and others who constitute the group of people who are potentially eligible for state-funding of counsel under *G.(J.)*.[18] There appear to be fewer than 20 reported child protection cases in which a claim to state-funded counsel has been given meaningful consideration. Of these, only five claims were granted at the trial level, with one subsequently overturned on appeal. We can speculate that there have been many more child protection cases in which the parents have potentially been eligible for state-funding of counsel under *G.(J.)*. Very few parents would be aware of any right to state-funded counsel beyond what is provided by the provincial legal aid system. We are unaware of any case in which child protection counsel or the judge raised the issue of state-funded counsel.[19] Indeed, many parents, particularly non-custodial

[17] A review of legal aid plans suggests that eligibility for legal aid funding of appeals, even for those who financially qualify for legal aid, often depends on an assessment of the merits of the appeal. Legal aid may pay for an opinion by a lawyer as to the merits of a proposed appeal, which they will then use to determine whether to fund the appeal. However, this is done without transcripts, even where the parent was not represented at trial. Once a decision is made denying coverage for the appeal, an unrepresented parent may still have to provide transcripts at their own cost in order to perfect the appeal. Given that appeals of child protection decisions are by right, and that without a transcript funded by legal aid a poor parent will be precluded from continuing with an appeal, we suggest that this process effectively usurps the role of the appellate court by giving the legal aid department the authority to determine whether the appeal goes forward.

[18] Since the decision in G(J), our research has identified only 43 reported cases in which an application for state-funded counsel in a civil proceeding has been given substantial consideration and only 15 of those are child protection proceedings. The primary matters of the 43 cases are child protection, child custody and access, human rights, immigration, mental capacity, negligence, property and civil contempt. The majority of the cases (31) involve child protection proceedings (15) or custody and access (16). Applications for state-funded counsel in custody and access proceedings have largely foundered on the point that they are regarded as private litigation that does not involve the state in a prosecutorial role. This limitation on the ambit of the right to state-funded counsel can be, and has been, criticized, but does take its lead from the emphasis given by Chief Justice Lamer in G(J) to the significance of the state as the actor that triggers child protection proceedings and, in so doing, triggers the threat to s. 7 rights. Of the 15 child protection cases, the applications in only 5 cases succeeded at the trial level, with one being overturned on appeal. (There has also been one successful claim in a human rights case and one in an immigration case.)

[19] This could be explained in part due to the lack of emphasis on the procedural rights of the parent in the child protection system as contrasted with the criminal system.

fathers (who are entitled to participate in the proceedings and present a plan for the child) may not even appear in court once legal aid rejects their application. Unlike criminal matters, there is no obligation for the respondent parent to participate in the proceedings in any way. In addition, requests for counsel by unrepresented parents may be dismissed without being reported.

Speaking generally, cases decided after *G.(J.)* have adopted its finding that child protection proceedings threaten the s. 7 rights of parents and have followed the framework of other factors set out in that case, namely: indigence; seriousness of the interests at stake; complexity of the matter; and, capability for self-representation. Of these factors, the main stumbling block to successful applications has been the need to establish indigence. The issue of how to define indigence was not addressed in *G.(J.)* because the applicant was in receipt of social assistance and so was assumed to be indigent. Of the reported decisions since *G.(J.)* in which indigent status has been the decisive issue, all but one have failed. As we will now discuss, in the cases rejecting claims to indigence, judges have struggled to establish a clear and fair standard and have displayed some troubling reasoning. These decisions also reveal some significant procedural concerns. In our view, these decisions have failed to take the kind of contextualized approach to the state-funded counsel test that informed *G.(J.)*.

***i. Assimilating to a more restrictive criminal context test***

As already mentioned, a first troubling aspect of the reasoning in some cases has been the importation of the test for entitlement to state-funded counsel in criminal proceedings, apparently in order to ensure that state-funded counsel is only ordered rarely. For instance, in *R.F. v. T.T.*,[20] a father applied at the opening of a child protection proceeding for state-funded counsel. The parents were separated and the mother, who was represented by counsel, had consented to a permanent care and custody order, which included an access arrangement. The judge found that the father was not eligible for legal aid and was capable of earning an income of around $60,000 for the year in which the trial was to be held. The father had no significant assets or debts. The judge noted that the father potentially fell into the category of people who earn too much income to be eligible for legal aid but not enough to be able to afford the legal fees of private counsel – even commenting that this "is not an unusual situation for families today."[21] And yet the judge also noted that this distinguished the situation from *G.(J.)* – in which indigency was uncontested – and so sought guidance from the decision in *Rowbotham* and subsequent cases. Here the judge struck upon the comments in *Rowbotham* that it would only be in "rare circumstances" that an accused would be denied legal aid and yet not be able to afford to retain counsel to the extent necessary for a fair trial. The judge then went on

[20] *RF v TT*, [2006] YJ No 66 [*RF*].

[21] *RF, ibid*, at para 15.

to follow the decision of the British Columbia Supreme Court in *R.* v. *Malik*[22] (to be discussed further in section 2.(A) i., below), which stands for a more restrictive and onerous definition and application of the *Rowbotham* test. In the judge's view, these requirements, and the approaches taken in preceding child protection cases, meant that the onus of proof on the father was "a heavy one"[23], which he had not met. While the judge expressed sympathy for the fact that the father was not aware of how heavy the onus was, that was not sufficient grounds to grant an adjournment to enable the father to better substantiate his application, especially given the length of time that the children had already been in state custody.

As we will discuss in more depth in section 2.(A), the idea of importing a restrictive test from criminal cases is troubling because the restrictive approach is controversial even within the criminal context. Second, it also seems to overlook a variety of important differences in the legal context of child protection proceedings that leave parents more vulnerable than an accused. Moreover, as mentioned in our review of *G.(J.)*, it was stated clearly there that the starting point for consideration of applications for state-funded counsel should not be that counsel will only be appointed rarely.

### *ii. Self-representation on the counsel-funding application*

The case of *R.F.* also illustrates a procedural concern that has emerged from child protection cases in this area, namely, the illogical assumption that a self-represented parent is capable of making the legal and evidentiary case to support a finding that they cannot represent themselves. The cases contain numerous examples of parents who do have counsel on the *G.(J.)* application not providing sufficient financial information or explanations to the court. Decisions as to state-funding of counsel will directly impact the quality of the case that a parent can put forward. Since fundamental human rights of both parents and children are at stake, we believe it is necessary for courts to ensure that state-funded counsel applications stand or fall on their merits, rather than on the misunderstandings, mistakes and miscommunications of an unrepresented applicant. And this is even more true where the parent is expected to meet a 'heavy' onus and disprove a presumption of exceptionalism in such cases. Indeed, recognizing this, one judge who adopted and applied the *Malik* framework nevertheless went on to caution that "care must be taken not to make the requirements so onerous that the self-represented parent will find it too difficult to make out a case."[24] We address issues of self-representation and the social context of child protection-involved parents in section 2.(C), below.

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[22] *R v Malik*, 2003 BCSC 1439, (available on CanLII), [*Malik*].

[23] *RF*, *supra* note 20 at para 19.

[24] *Re V*, 2009 SKQB 50 at para 11, [*Re V*].

### *iii. Legal aid financial eligibility cut-offs as indigency benchmarks*

A third area of concern arising in subsequent cases is the idea that the cut-offs for financial eligibility for legal aid might serve as adequate proxies for capacity to afford counsel. For instance, in *Huron-Perth CAS v J.J.*,[25] a father sought state-funded counsel to contest an application by the child protection agency for Crown wardship of his children without access. The father appeared to be particularly concerned about a lack of access rights. The fact that the father had been represented by counsel up until close to the date of the trial was no doubt an influencing factor in the court's denial of the application, but the judge did apply the factors relevant to determining financial eligibility for state-funded counsel used in the criminal context and held that they were not satisfied. In addition, the judge quoted with approval the remarks of a trial judge in a criminal case who doubted that he had either the power or the legitimacy to "upset the legal aid system."[26] The judge in *Huron-Perth* then concluded as follows:

> To grant this order would mean that any parent involved in a child protection case where Crown wardship was in issue would be entitled to publicly funded counsel, regardless of whatever legal aid criteria might be in place. There would then be no purpose in having a legal aid plan. Surely, it is reasonable to think that the legal aid program in the province is capable of assessing financial eligibility in a sensible, logical and humane fashion.[27]
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> ...
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> There is nothing in the evidence before me that says that [the father's] financial situation is extraordinary or that it is of such a nature that he cannot afford private counsel.[28]

This conclusion is problematic. A successful application in this case would only provide a precedent for parents in similar financial circumstances. There obviously would be more parents entitled to state-funded counsel under a less restrictive approach to indigency, but the onus should be on the government to demonstrate that this result would overwhelm the government's resources. More importantly, the reasoning in *J.J.* effectively allows indigency to be defined not in terms of affordability for individual applicants but, rather, in terms of affordability for governments, as defined by existing legal aid eligibility cut-offs. As will be discussed in section 2.(B), below, these cut-offs are not a reliable measure of capacity to afford counsel. Moreover, the very basis of the *G.(J.)* claim is a failure to qualify for legal aid (in terms of the refusal of legal aid to cover the particular child

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[25] *Huron-Perth CAS v JJ*, [2006] OJ No 5372 [*Huron-Perth*].

[26] *R v Magda and Magda*, [2001] OJ No 1861 at para 23.

[27] *Huron-Perth*, *supra* note 25 at para 38.

[28] *Ibid*, at para 39.

protection proceeding in question in that case). It hardly makes sense for failure to qualify for legal aid to be both the pre-requisite and the disqualification of the claim to state-funded counsel.

### *iv. Review of financial management and budget priorities*

A final troubling aspect of the reasoning in child protection cases involving claims for state-funded counsel has been the idea that judges ought to assess whether the claimants have adequately prioritized the need to raise funds to retain counsel. On the one hand, it is difficult to argue against the suggestion that there may be circumstances in which a parent could clearly have afforded counsel if he or she had not frittered away money. But, on the other hand, the task of objectively and meaningfully assessing a parent's budgeting and prioritizing presents obvious challenges for a court. Not only does a court need to ensure it has before it sufficient information on income, expenditures, assets and liabilities, but it also needs to identify, understand and apply principles of prudent budget management to the infinitely variable circumstances of particular individuals. Moreover, there will typically be a significant socio-economic gap between the judge and the claimant, requiring the judge to take steps to understand the impact of this and other differential aspects of the claimant's social context. However, careful and contextualized analysis of prioritizing is seldom apparent.

For instance, in *Family and Children's Services of Guelph and Wellington County v. K.F.*,[29] the parents together sought state-funded legal counsel for a child protection hearing. Both were employed, with a combined gross income of about $43,000 per annum. They also had significant debts of almost $18,000. Of this, $4290 was owed to the maternal grandmother, including a loan of $3000 for legal fees. The couple had applied for legal aid but been rejected and their appeal to the area director had also been rejected. It was estimated that the protection application hearing would take 5 days with costs of $20,000 for an expert witness report (to counter the reports tendered by the protection authority) and $15,000 to $20,000 for legal fees. The judge dismissed the application for state-funding of counsel on the grounds that the parents were people "with a reasonable income who, with a reworking of priorities, should be able to retain counsel."[30] In so finding, the judge expressed general dissatisfaction with the quality of the parents' financial evidence, noting that the evidence on gross income was unclear and that they had not provided an explanation of the debts they had accumulated nor presented any evidence of any effort to consolidate their debts. The judge also held it against them that almost one quarter of the debt was owed to a family member.

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[29] *Family and Children's Services of Guelph and Wellington County v KF*, [2001] OJ No 4548 [*KF*].

[30] *Ibid*, at para 42.

The suggestion that the parents ought to have been able to afford counsel with a re-working of priorities is difficult to fathom. It was not contested that the trial would cost almost as much as their annual gross income. Nor was it contested that they were already significantly in debt – in part due to legal costs. Consolidation of debt can reduce interest payments, but the debt remains. The mere fact that part of the debt is owed to a family member seems beside the point – certainly, the judge did not attempt to explain why this was being held against the couple. Clearly the couple had made some attempt to meet the costs of counsel, including incurring more debt, but were having difficulty. There is nothing in the judge's reasoning that explains how a re-working of priorities could allow them to finance $35,000-$40,000 in trial costs.

Similarly, in *Re V.*, a mother sought the appointment of state-funded counsel for an appeal of a trial decision which placed all five of her children in the care and custody of relatives, other people or the Ministry. The mother had been represented at trial by legal aid counsel but had since secured some employment that raised her monthly income to $1,708 – the legal aid cut-off for single persons, referred to by the judge, was $785 per month. The mother's application was rejected on the threshold question of whether she had established indigency. In the view of the judge, the mother had not adequately explained her financial situation, particularly the significant debt she had incurred, including for purchase of furniture and a new car. Along the way, the judge derided her for purchasing such "creature comforts" and was not convinced by her explanation that she had purchased the car in order to visit one of her children who was in care in another city, some 350 kilometers away. What is troubling here is that, even if the mother's purchases were problematic, it is difficult to see how she could afford counsel on her income, even if she had not accumulated those debts. Moreover, perhaps the fact that she had purchased a new car on her income could have been regarded as raising the issue of whether she was capable of competent money management, and therefore ought to be offered assistance, rather than merely being criticized for frittering it away.[31] We address such social context issues in general, and issues of financial literacy more particularly, as well as mental health, in section 2.(C), below.

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While cases subsequent to *G.(J.)* have adopted its framework for determining eligibility for state-funded counsel in child protection cases, a significant proportion of those applications have been rejected for want of a demonstration of indigency. Moreover, the reasoning on how to define and determine indigency, although by no means uniform or consistent, give rise to a number of concerns, as just identified. However, the relatively recent decision in

[31] In *Re V*, *supra* note 24, the mother had launched a status review application seeking the return of her children to her care. Because she had initiated the proceedings, rather than defending against the State, the court may have been less sympathetic to her application.

*T.L.*, upheld on appeal, which accepted a claim of indigence, has offered a break from the problems of these cases and, in our view, represents a better approach.

### (C) The *T.L.* Approach

In *T.L.* an application for state-funded counsel was made jointly by parents seeking to oppose an application for continuing custody of their children. The parents' application was argued by *amicus curiae* counsel. After summarizing the principles established in *G.(J.)* and confirming that the provincial court had the power to order a government to pay for counsel, Judge Silnick discussed and applied the framework of factors.

Addressing the indigence factor first, Judge Silnick noted that indigence had not been defined in *G.(J.)* and that the British Columbia Attorney General had argued that the court should follow the definition used in *Rowbotham* and other criminal cases. The parents' counsel opposed this, arguing that differences in criminal and civil contexts (which were not identified in the reasons for decision) mean different principles should be applied. Silnick J. noted that the criminal cases had established a "fairly rigorous standard" for determining indigence and then reviewed prior decisions on applications in a child protection context. Summing up, he stated:

> These [child protection] cases do not establish any hard and fast rules about when a family litigant will be considered indigent. They do support the principle that one may have an income outside of the guidelines for legal aid coverage and yet still be indigent. The cases also suggest that a determination of this question will turn on such factors as the length of the case, the estimated cost of counsel, whether it is possible for the applicant to afford counsel with a reorganization of finances and whether or not the party has been diligent in making the necessary arrangements to obtain counsel. All of these factors must be considered under the umbrella of the guiding principle that the goal sought to be achieved is procedural fairness.[32]
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> ...
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> From a review of all of the case law, I conclude that for a person to be indigent, they need not be homeless, unemployed or penniless. This conclusion is supported in the fact that a person might work full-time at a minimum wage job and yet still fall within the guideline for legal aid coverage. Many of the working poor will be considered indigent where they are in receipt of a low wage from which there is considerable difficulty covering reasonable living expenses. When such persons are faced with an unforeseen expense such as a need for legal counsel in order to provide a fair hearing to defend a right under section 7 of the *Charter*,

[32] *TL*, *supra* note 3 at para 15.

> they have no reasonable means of meeting that expense because of their financial situation, which can properly be described as indigence.[33]

Applying these principles, Judge Silnick noted that the parents' average net monthly income of $3,518 was $468 above the legal aid cut-off for a family of four. His Honour also noted, approvingly, that the *amicus* counsel had assisted the parents in consulting a professional accountant to prepare a financial statement. According to Silnick J., this statement revealed that the family lived frugally but did not appear to have sufficient room in the household budget to manage an unforeseen cost such as legal counsel. On this basis, Silnick J. reasoned that he could not find that any re-arrangement of priorities would make counsel affordable for the parents. The parents had, for instance, already entered into a debt management arrangement with the help of credit counselors.

Counsel for the Ministry of the Attorney-General had argued that the Ministry had put forward a proposal to fund counsel in exchange for three payments of $800 per month. The parents would not agree because they felt they could not afford this amount. Judge Silnick agreed and so would not accept that this was proof of the parents' unwillingness to exhaust all reasonable options for funding counsel.

It is also worth noting that Silnick J. took the position that the approach he had taken to interpreting and applying the principles set out in *G.(J.)* was consistent with Justice L'Heureux-Dubé's remarks that it will not necessarily be rare to have to appoint state-funded counsel in child protection matters.

On appeal to the BC Supreme Court,[34] Justice Adair fully endorsed Judge Silnick's approach, expressly regarding it as consistent with *G.(J.)* in general and Justice L'Heureux-Dubé's remarks in particular. Justice Adair noted that the Attorney-General was treating the appeal as a test case. The Attorney-General sought to have the test for state-funded counsel in criminal matters expressly adopted for the child protection context. In particular, the Attorney-General advocated the adoption of the more restrictive version of the criminal test, as set out in *R. v. Malik* (to be discussed in section 2.(A) i., below).

Consequently, the Attorney-General's primary ground of appeal was the argument that the provincial court decision in *T.L.* was out of step both with *Malik* and subsequent criminal cases, as well as the similarly restrictive approach taken in prior child protection cases (that is: *K.F.*, *Huron-Perth*, *R.F.*, and *Re V.* (as already

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[33] *Ibid*, at para 27.

[34] *British Columbia (Director of Child, Family and Community Service) v TL*, [2010] BCSC 105 [*TL*#2].

reviewed, above)). The Attorney-General argued that the 'financial eligibility' test for state-funded counsel could not be designed as a "simple across-the-board income cut-off at some level above the legal aid guidelines"[35] but, rather, needed to be "a detailed and relative assessment that is sensitive to the court's circumscribed constitutional role in granting constitutional remedies of this nature."[36] The Attorney-General sought approval of a four-part test of financial eligibility that would take into account all financial means even *potentially* available to the applicant; impose a heavy evidentiary burden to prove and explain all financial matters; vary according to the amount of expenditure on counsel required; and, *require* some level of contribution from the applicant. In the view of the Attorney-General, Judge Silnick had departed from precedent, which supported a test with these parameters. While the Attorney-General, according to Adair J., noted that the amount of funding needed for any individual child protection case may generally be less than for a criminal case, it put in issue the cumulative effect of applying a more relaxed standard of financial eligibility and emphasized the need to ensure accountability for the expenditure of public funds. As Adair J. put it, the Attorney-General clearly saw the lower court ruling "as a dangerous precedent, opening the floodgates."[37]

Rejecting this ground of appeal, Adair J. held that assimilating the test for state-funded counsel in child protection cases into the test in criminal cases was not consistent with *G.(J.)*, nor mandated by the subsequent child protection cases cited by the Attorney-General. In doing so, Adair J. took pains to point out that it was not held in *G.(J.)* that orders for state-funded counsel in child protection proceedings should be 'exceptional and rare'. Rather, that language was used in *Rowbotham*, and re-iterated in *Malik*, but was expressly rejected by Justice L'Heureux-Dubé in *G.(J.)*. Moreover, argued Adair J., it needed to be recognized that child protection proceedings do not simply pit the state against parents but also directly involve the best interests of the children. If the onerous evidentiary burden urged by the Attorney-General were imposed in child protection cases, there would often be delays that would put those interests at risk.[38]

In our view, the less restrictive approach taken by Judge Silnick at trial in *T.L.*, and upheld on appeal, is far preferable to the more restrictive approach urged by the British Columbia Attorney-General. Moreover, as we try to explain in what

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[35] *Ibid*, at para 32.

[36] *Ibid*.

[37] *Ibid*, at para 45.

[38] In addition, the Attorney-General argued that Silnick J had erred in refusing to defer to its efforts to negotiate a reasonable contribution agreement and that he had misapprehended the evidence as to whether the parents had sufficient income to make a contribution. Justice Adair held that Silnick J had not erred in these respects but had simply reached a different conclusion on the evidence as to whether a contribution was feasible.

follows, the differences between the more and less restrictive approaches can be understood as revolving around the extent to which the understanding and application of the test for state-funded counsel takes account of the relevant legal, social and judicial context of child-protection matters. As we have already mentioned, such contextualization was apparent in the origins of the right in *G.(J.)* and so, we argue, the less restrictive approach of *T.L.* points the direction for a reclaiming of a contextualized right to state-funded counsel in child protection cases. We now move to a consideration of the context relevant to the various concerns that we have been identified as arising from the cases prior to *T.L.*

## 2. In Defence of a Contextual Approach

### (A) Against Assimilation to a More Restrictive Criminal Context Test

#### *i. State-funded Counsel in Criminal Cases: Competing Strains*

The 2003 decision of the British Columbia Supreme Court in *Malik*, mentioned above, and a more recent decision of the Ontario Court of Appeal, *R. v. Rushlow*,[39] highlight the starkly different views taken by some courts when confronted with this issue. They both start with the well-known decision in *Rowbotham*, but take significantly different approaches to its application. In this section, we first summarize *Rowbotham* and then review *Malik* and *Rushlow*.

##### a) *Rowbotham*

There were ten appellants in *Rowbotham*, charged with conspiring to import and traffic in hashish and marijuana. The appeal dealt with multiple issues, including wiretaps, judicial bias, admissibility of out-of-court statements, and the constitution of the jury. Two of the appellants, George and Laura Koronow, were not represented by counsel at trial. Laura Koronow, who had been charged with two counts of conspiracy to traffic, had applied for court-appointed counsel after jury selection. Her application was dismissed. She was found guilty of conspiracy to traffic in hashish and was sentenced to two years less a day of imprisonment. Some of the evidence against her included wiretap evidence and results of a search.

Laura Koronow was a technologist at a medical laboratory and her gross income at the time of the trial was $24,338 per year, with a net income of $1,432 per month. Her legal aid application had been denied based on her income. Her appeal to the legal aid area committee, and her application for judicial review of the legal aid decision, were both denied. At the time of the application for court-appointed

[39] *R v Rushlow* 2009 ONCA 461 [*Rushlow*].

counsel, the trial was expected to last four months and in fact lasted approximately one year.

The trial judge did not decide whether a trial court is permitted under the *Charter* to appoint counsel for an indigent accused and order that counsel to be compensated by legal aid. He did note that "in an extreme case, that power may exist where a trial judge is satisfied that the decision by Legal Aid not to grant a counsel certificate is completely perverse, given the accused's financial situation, the complexity and length of the trial, and the substantial possibility of lengthy imprisonment."[40]

He stated that there was no doubt that "in an average case", legal aid should not be provided to Koronow. He considered whether an exception should be made in this case, given the complexity and anticipated length of the trial. Having determined that the issue was whether the legal aid decision was "completely perverse," he held that the applicant had not satisfied him that she could not have arranged for a loan or made other arrangements to retain counsel. He therefore dismissed her application.

The Court of Appeal started its analysis with a discussion of the history of the right to counsel. Common law did not recognize a right of an accused person to be defended by counsel. Even following statutory amendments in England and Canada providing for the right to the assistance of counsel in a criminal case, the right to counsel did not include the right to state-funded counsel. However, the court noted that prior to the enactment of the *Charter*, the right to counsel had become a social or human right, obliging the state to provide counsel for accused who could not pay for a lawyer. The court noted the provisions in the International Covenant on Civil and Political Rights, to which Canada is a signatory, and the European Convention on Human Rights, guaranteeing counsel, at no cost, to people accused of criminal charges "when the interests of justice so require" and where the person does not "have sufficient means to pay" for legal assistance.[41]

The Court went on to determine that although the *Charter* did not expressly require state-funded counsel for accused persons who could not afford counsel, this was due to the fact that at the time the *Charter* was enacted, legal aid systems were already in place in Canada:

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[40] *Rowbotham, supra* note 2 at 55 (as quoted by Ontario Court of Appeal).

[41] *European Convention on Human Rights, Council of Europe*, 4 June, 1950, Eur TS No 5 at Art. 6; International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 at Art. 14.

> In our opinion, those who framed the *Charter* did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, *in cases not falling within provincial legal aid plans*, ss.7 and 11(d) of the *Charter*, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused is essential to a fair trial.[42]

The Court of Appeal found that in the circumstances of the case, Laura Koronow could not have a fair trial without representation by counsel, and, contrary to the trial judge's finding, she lacked the means to employ counsel to conduct a 12-month trial. The court did note that she would not have needed counsel at every part of the trial, since a substantial amount of the evidence concerned her co-accused and not her. The court suggested that legal aid could have been granted on the condition that counsel only attend those parts of the trial that were crucial to Koronow, and that she contribute to the cost of the legal aid and/or agree to pay the entire cost back over a period of two years. (Her counsel had, in fact, stated that she was prepared to contribute to the cost.)

The court determined that in the "exceptional" case where legal aid is refused and representation is essential to a fair trial, the judge may stay the proceedings upon being satisfied that the accused lacks the means to employ counsel. The court noted that this power existed prior to the advent of the *Charter* and is therefore clearly appropriate under s. 24(1) of the *Charter*. Legal Aid or the Crown would be required to fund counsel in order for the stay to be lifted. With respect to the decisions of Legal Aid Ontario not to fund Koronow's defence, the Court's position, as quoted above,[43] was that any finding by legal aid that an accused did have the means to afford counsel was entitled to "the greatest respect", but there might still be "rare circumstances" in which state-funded counsel is still called for.

### *b) Rowbotham's elibility test modified: R v Malik*

The original test in *Rowbotham* for eligibility for state-funded counsel has been modified in the nearly thirty years since that decision. A number of courts have considered so-called "*Rowbotham* applications" and in so doing, have added increasingly stringent elements to the financial eligibility test. The restrictive

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[42] *Rowbotham, supra* note 2 at 33 [emphasis in original]. In fact, The Supreme Court of Canada later examined the debates surrounding s 10 of the Charter and determined that the right to state-funded counsel was deliberately excluded: see Prosper, *supra* note 12.

[43] See quotation accompanying *supra* note 10.

approach to appointment of counsel is illustrated by the decision of the British Columbia Supreme Court in *Malik*.

Ripudaman Singh Malik was charged with multiple counts of first-degree murder and was the only person to go to trial for the Air India terrorist bombing, which took place in 1985. Despite previously asserting to the Attorney-General of British Columbia that he had significant assets that would take time to liquidate, Malik eventually claimed he was insolvent, that he had various unsecured creditors (all family members) and that he could not contribute to his legal fees. Mr. Malik was denied legal aid. It was conceded that Malik required counsel to receive a fair trial. The issue was whether he had the means to pay or contribute to his defence.

The court referred to a number of authorities to support its assertion that the evidentiary burden on the applicant is a balance of probabilities and is a "very heavy burden."[44] With respect to the test for financial eligibility, the court stated that the applicant's financial circumstances "must be extraordinary"; that the applicant must provide detailed evidence of his or her financial circumstances and of his or her of attempts to obtain legal representation; the applicant must make efforts to save money, borrow, including from children or family members; obtain employment or additional employment; look for counsel willing to work at legal aid rates, and exhaust all efforts to utilize assets that the applicant owns to raise funds. The court also held that "the applicant must be prudent with his/her expenses and show foresight and planning of financial affairs to enable financing of counsel" and then stated that "[l]ack of planning or foresight need not be planned or deliberate."[45] Most significantly for the case at hand, the court held that "[a]n applicant who claims to be indigent is not entitled to state-sponsored funding where they have made themselves indigent."[46]

As such, the decision in *Malik* clearly sought to impose a heavy burden on applicants for state-funded counsel in criminal cases. In our view, this approach ought to have been confined to its facts and understood in context.[47] The Air India bombing was a horrendous act of international terrorism that had essentially gone

[44] *Malik*, *supra* note 22 at 6. We note that in the subsequent decision of the Supreme Court of Canada in *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, the Court clarified that there is only one civil test: a straight balance of probabilities.

[45] *Ibid.*

[46] *Ibid.*

[47] Indeed, in the recent decision in *R v Kim*, 2011 BCSC 137 (CanLII), at para 51, Justice Smart of the British Columbia Supreme Court argued similarly: "In applying the above factors, one must consider that *Malik* was an exceptional case. Mr. Malik was a successful and sophisticated businessman who, at his bail hearing, had provided evidence that he had assets worth millions of dollars to post as security for his release. Two and a half years later at his *Rowbotham* application he argued that he lacked the financial means to pay his legal team or even make a contribution towards payment."

unpunished. Malik was the only person brought to trial, nearly 20 years later. Moreover, Malik seemed to be clearly attempting to manipulate the state-funded counsel system. Faced with this, and the astronomical costs of a trial of this magnitude, it is understandable that the court would seek to take a hard line with the test for state-funded counsel. However, the only finding that was actually necessary to the result was that Malik in fact had access to substantial assets. The court concluded that Malik did, in fact, have significant assets – in the millions of dollars - and had manipulated his finances in an attempt to avoid paying for counsel himself. A number of the court's other statements regarding the test for financial eligibility, including the comment that lack of foresight need not be planned or deliberate in order for state-funded counsel to be denied, were unnecessary to the court's ultimate findings. On any reasonable approach to the *Rowbotham* test, Malik's application should have failed, simply because he had access to substantial assets to pay for counsel. Consequently, we suggest that judges ought to be cautious about adopting the more restrictive approach represented by *Malik* even in criminal cases, let alone in child protection cases.

### *c) Rowbotham amplified: R. v. Rushlow*

Six years after *Malik*, and more than 20 years after *Rowbotham*, the Ontario Court of Appeal again explored the role of the judge in appointing counsel for an unrepresented accused. In this case, the defendant was charged with arson. The Crown's case was complex, involving expert evidence, similar fact evidence, and thirty witnesses for the Crown.

At the beginning of trial Rushlow stated that he was prepared to proceed without counsel. The trial judge was concerned as to whether this decision was voluntary and learned that Rushlow had been denied legal aid. Crown counsel herself expressed concern about Rushlow's lack of counsel, given the complexity of the proceedings. The trial judge offered to adjourn the matter further so the appellant could again speak to Legal Aid Ontario. The trial judge then explained to Rushlow the possibility of a *Rowbotham* order, explained how to make an application for state-funded counsel and adjourned to allow the appellant to assemble the necessary financial information.

At the hearing of the application, the Crown conceded that the matter was very complex, without conceding that Rushlow could not receive a fair trial without counsel. She noted that the applicant worked at a stamping plant and would have difficulty with cross-examining even the non-expert witnesses.

Justice Pomerance recessed briefly and then ruled that the appellant had not met the first branch of the *Rowbotham* test, finding that he would not be deprived of a fair trial if the trial proceeded without representation for him. She quoted the trial

judge in *Rowbotham* to the effect that it would be an "extreme case," where the denial of counsel would be "perverse," that would entitle a defendant to state-funded counsel. She then stated that a *Rowbotham* application requires "unique challenges above and beyond those that would ordinarily be expected in a criminal trial. Were it otherwise, an enormous number of self-represented individuals might well be entitled to state funded counsel, thereby causing a serious interference with the administration of the state sponsored Legal Aid Plan."[48]

Following his conviction, Rushlow appealed, solely on the grounds of the trial judge's refusal to order state-funded counsel. The Court of Appeal started its analysis by noting that a court hearing a *Rowbotham* application is not engaging in a review of legal aid policies; instead, "it is fulfilling its independent obligation to ensure trial fairness."[49] It noted that *Rowbotham* orders are exceptional, but not because they are only required in exceptional cases; it is because it will be rare that an accused who cannot afford counsel will be denied legal aid.

Rosenberg J.A. for the Court held that the trial judge imposed too stringent a test, noting that the Court of Appeal had not adopted the trial judge's requirement of "perversity" in *Rowbotham*, and that "unique challenges" are not required:

> The authorities hold that the case must be of some complexity, but a requirement of unique challenges puts the threshold too high. It is enough that there is a probability of imprisonment and that the case is sufficiently complex that counsel is essential to ensure that the accused receives a fair trial.[50]

The Court found that the case was in fact sufficiently complex, and Mr. Rushlow's background insufficient to prepare him for such a trial. Finally, the charge was serious, leading to the possibility of incarceration. Therefore, counsel was required. Interestingly, the Court of Appeal made this finding – that counsel was essential to ensure Rushlow received a fair trial – notwithstanding the Court's observation that Pomerance J. conducted a "model trial" for an unrepresented accused, doing everything possible to assist Rushlow during the trial. The Court of Appeal also noted that the fact that the trial judge's rulings may not have been wrong (none of Pomerance J.'s rulings were appealed) does not mean that the appellant had a fair trial or the appearance of a fair trial. In other words, the assistance of counsel might have changed the outcome, and therefore it was necessary for a fair trial. Rosenberg J.A. also expressed concern about the trial judge's comments regarding

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[48] *Rushlow*, *supra* note 39 at para 23 (as quoted by the Ontario Court of Appeal).

[49] *Ibid*, at para 18, quoting *R v Peterman* 2004 CanLII 39041 (ON CA), [*Peterman*] at para 22.

[50] *Ibid*, at para 24.

legal aid. He stated, "It was not the trial judge's concern how the decision to appoint counsel in this case would impact on Legal Aid Ontario's operations."[51] Because the trial judge did not consider whether the appellant had the means to retain counsel, the Court of Appeal received fresh evidence on the issue. The Court held, without providing details, that the evidence demonstrated that the appellant was "impecunious." The Court also noted that although Rushlow would be entitled to appeal the most recent denial of legal aid (he had also been denied legal aid in 2005 and his appeal at that time failed), his financial circumstances had not changed so there would be little point to his appeal. He had only consulted one lawyer after the preliminary hearing, and appeared to have been unable to afford the retainer. He had also acquired some debts after the fire, reducing the funds he would have available to retain counsel. Rosenberg J.A. responded to these arguments with the following:

> Perhaps the appellant could have made further efforts to privately retain counsel and he may have made some poor financial decisions. However, I accept the very fair concession from counsel for the respondent, which is stated in these terms in her factum:
>
> > This is not a case in which the appellant's finances reveal that he could have retained counsel and made a calculated decision not to.[52]

The court concluded that Rushlow did not have the means to retain counsel and that therefore his *Charter* rights had been violated. The court ordered a new trial.

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Thus within the criminal law context, we see two approaches that diverge along two lines. The first line of divergence is the approach to identifying indigence and financial need. Under the more restrictive approach, represented by *Malik*, applicants must exhaust all options for raising funds for legal expenses and applications can be refused where the applicant fails, even unintentionally, to demonstrate foresight and prudence in managing his or her finances over what can be an extended pre-trial time period. Furthermore, the inquiry into foresight and prudence is not expressly undertaken in relation to any specific financial management benchmarks nor with any express acknowledgement of the social context of the applicant. In contrast, the less restrictive approach, represented by the appeal court decision in *Rushlow*, focuses simply on the present financial circumstances of the applicant. This approach does not deny applications on the basis of a lack of prudence in managing financial affairs, except where there is evidence the accused has deliberately depleted his or her assets in order to avoid paying for counsel. The second line of divergence is the concern about imposing costs on governments or interfering with the administration of legal aid. On the more restrictive approach, judges try to limit the appointment of state-funded counsel so as

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[51] *Ibid*, at para 25.

[52] *Ibid*, at para 30.

not to impose significant additional costs beyond what governments have already allocated under legal aid plans. On the less restrictive approach, the effect on the legal aid plan – or the overall cost of state-funded counsel – is not a valid reason for denying state-funded counsel where it is necessary. Taken together, the two lines of the more restrictive approach seek to manufacture rareness in the appointment of state-funded counsel beyond the parameters of what is already provided in legal aid plans. In our view, and as is the tenor of the appeal court in *Rushlow*, the danger of the restrictive approach is that achieving rareness is privileged over ensuring fairness.

The two elements that characterize the more restrictive approach in the criminal context are also present in the child protection context. As mentioned in Part 1, judges in child protection cases have undertaken similarly onerous inquiries into financial management, priority-setting and prudence. Judges have also evinced reluctance to offer funding beyond the scope of legal aid plans and have argued that legal aid plans can be used as the reference point for determining indigence.

The purpose of our review of leading cases on appointment of state-funded counsel in criminal cases has been to show that the more restrictive approach is being questioned even within the criminal context. This, alone, counts against any importation of the more restrictive approach into child protection contexts. But there is another important reason for pursuing a less restrictive approach in child protection contexts, namely, the significant differences in the extent to which the legal context of the child protection system protects the interests of parents, as compared to the protection afforded to accused persons in the criminal justice system. We address that issue in the next part of this section. Following that, we move on to address the issue raised by the two lines of argument along which the more and less restrictive approaches diverge.

### *ii. The Legal Context of Child Protection Proceedings*

Child protection proceedings occupy a unique place along the spectrum of state action against individuals. Like criminal proceedings, they involve an arm of the state (child protection agencies instead of police forces) who are responsible by law for the protection of the public (children, as opposed to the general public) and who have considerable powers to facilitate that protection (including the power to remove the child – as opposed to the accused criminal – from the possibility of harm through apprehension). As in criminal cases, the state bears the onus of proving the allegations against the parent. Many of the same underlying activities – drug use, violence, neglect – can and often do lead to parallel proceedings in criminal and child protection court. Child protection agencies and police forces often conduct joint investigations into cases of domestic violence, injuries to children, and failure to protect, and in many jurisdictions have developed joint protocols for information-sharing. That child protection proceedings can affect parents as profoundly as

criminal proceedings was recognized in *G.(J)*. Indeed, Crown wardship cases are often referred to by courts as the "capital punishment" of child protection cases, given the total finality of the severance of the child-parent relationship.[53]

However, there are key differences, all stemming from the overriding concern for the welfare of the child, a concern that trumps parental rights. As the Supreme Court has noted, quoting the Alberta Court of Appeal, child protection legislation "is about protecting children from harm; it is a child welfare statute and not a parents' rights statute".[54] In what follows we review those differences and their significance.[55]

First, the standard of proof in child protection cases is the civil "balance of probabilities" standard – a much easier test for the state to meet. Frequent attempts by courts to require child protection agencies to meet a higher test have been repudiated by higher courts.[56] In most cases, the agencies must prove only that the child would be at *risk* of harm (such as risk of physical harm, emotional harm, or sexual abuse) if she remained in her parents' care without court intervention. Proof of actual past harm is not necessary in such cases.

Second, the parent has no right to silence. Indeed, the child protection agency's case may rely to a significant extent on statements made by the parent to the agency social worker or others. There is no requirement that the worker warn the parent that statements made by them may be used against them in court. They have no right to be asked if they want counsel to be present before they speak to the social worker.[57] Of course parents' phone lines are not wiretapped in the course of child protection proceedings but the protection agency often has a much richer source of information against the parents: the child. A child in the agency's care will often speak about their home life to their foster parent or their social worker, who are each

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[53] *Children's Aid Society of the United Counties of Stormont, Dundas and Glengarry v BS* (2009) CanLII 9438 (ON SC); *Children and Family Services for York Region v SS*, (2003) CanLII 2408 (ON SC).

[54] *T v Alberta (Director of Child Welfare)*, 2000 ABCA 182 (CanLII), (2000), 188 DLR (4th) 603, at para 14, quoted in *Winnipeg v KLW*, *infra* note 59 at para 80.

[55] For an overview and analysis of evidence law in child protection proceedings generally, see R Thompson, "The Cheshire Cat, or Just his Smile? Evidence Law in Child Protection" (2003), 21 Can FLQ 319-378.

[56] *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, citing a British child protection case, *In Re B (Children)*, [2008] 3 WLR 1, [2008] UKHL 35; *DCW (PEI) v AH and JD*, 2009 PECA 19 (CanLII); *Nova Scotia (Community Services) v CM*, 2011 NSSC 112 (CanLII), *SJB et al v Child and Family All Nations Coordinated Response Network*, 2009 MBQB 12 (CanLII); *PC1 v Saskatchewan* (Social Services), 2009 SKQB 335 (CanLII); *Catholic Children's Aid Society of Metropolitan v AD* (1994), 1 RFL (4th) 268 (Ont Ct Gen Div).

[57] *Family and Children's Services of St. Thomas and Elgin County v F(W)*, 2003 CanLII 54117 (ON CJ) [*FW*].

under a duty to record the information and pass it along to the worker in charge of the case. Child protection agency workers do not violate the parents' or child's rights by interviewing the child.[58] In addition, access visits between the parent(s) and child in care often take place in the presence of agency staff, whose observations of the visits, including what is said by both parents and children, often become evidence at trial. Courts have ruled that child protection agencies are entitled to rely on events and evidence post-dating the original protection application in order to establish that a child is in need of protection, and anything relating to both the past and current circumstances of the parent could be relevant to the determination of placement once a finding that the child is in need of protection has been made.[59]

Third, although agency workers do not have an explicit right to search a parent's home, interim supervision orders – that is, court orders that are made on the basis of (often untested) affidavit material only – typically give the worker the right to enter the home without prior notification. Anything they observe in the home (such as drug paraphernalia, safety hazards, or evidence of the presence of a violent partner) may well make its way into the agency's evidence and/or justify an immediate apprehension of the child.

Fourth, every person in Canada has a duty to report to an agency when they have reasonable grounds to believe a child is in need of protection, and depending on the jurisdiction, may face a fine and/or imprisonment if they fail to abide by the reporting duty.[60] The public has no such duty to report criminal activity (unless it falls within the child protection duty to report).

Fifth, hearsay information is routinely relied upon to support the temporary order either removing the child or placing the family under the child protection agency's supervision. This is expressly permitted by statute.[61] Although hearsay is not necessarily permitted at trial (except where considered necessary and reliable, as in criminal proceedings)[62], it is at this temporary removal stage that the infringement of the parent's section 7 rights first occurs.

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[58] *Ibid.*

[59] *Children's Aid Society of Hamilton-Wentworth v KR and CW*, (2001) OJ No 5754.

[60] The duty to report provisions exist in all provincial child protection statutes; some provide for penalties for failure to report by certain professionals, others provide for penalties for all individuals who fail to report, and others do not provide for a penalty for failing to report. See, for example, s 4(1) and s 4(6) of Alberta's *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 and ss 14(1), (3) & (6) of British Columbia's *Child, Family and Community Service Act*, RSBC 1996, c 46.

[61] See, for example, *Child and Family Services Act*, RSO 1990, c C.11, s 51.

[62] This varies by province. British Columbia's *Child, Family and Community Services Act*, RSBC 1996, c 46, s 67, for example, allows hearsay at any hearing, if it is reliable and considered to be in the child's interests to do so.

Sixth, because child protection proceedings are civil in nature, disclosure is not required unless it is requested. There is no *Stinchcomb* right to automatic disclosure of the agency's records. Although most judges will canvass whether disclosure has taken place prior to setting a case down for trial, this is not automatic. It is common for societies to provide disclosure only upon request.

There are some procedural protections. Each child protection statute sets out timelines for the proceeding, requiring a hearing within a few days of the apprehension of the child and a final disposition within one or two years of the child coming into the Society's care; in many jurisdictions warrants are required for the apprehension of children except in cases where the time involved in obtaining the warrant would place the child at risk. Although many child protection statutes provide for warrants for apprehension, the Supreme Court has held that a provision allowing for warrantless apprehensions of children did not violate s. 7 of the *Charter* because the statute did provide for review of the apprehension by a court within five days.[63]

However, the crucial difference in terms of these rights is enforcement. In a criminal case, violation of *Charter* rights can and often does result in the exclusion of evidence and/or a stay of proceedings. However, there is no comparable outcome in child protection proceedings. Courts cannot and will not stay a child protection proceeding in response to the agency's behaviour, no matter how egregious that behaviour is, unless the court is satisfied that the child will be safe in the parents' care. Likewise, any evidence which is relevant to the issue of risk to the child and/or best interests of the child will be considered, regardless of how it was obtained.[64]

The statutes that govern child protection matters make it plain that intervention in a family is to be limited to that which is necessary for the protection of children, and agencies are under a duty to provide information to the court that supports the parents' case.[65] Nonetheless, courts frequently admonish agencies for acting with apparent tunnel vision, failing to assist parents, structuring access so as to undermine the parents' relationship with the child, focusing on the negative and in other ways failing to act appropriately and assist parents pursuant to their legislated duties.[66]

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[63] *Winnipeg Child and Family Services v KLW*, [2000] 2 SCR 519.

[64] *Chatham-Kent Children's Services v JK*, [2009] OJ No 5423.

[65] See, for example, *Children's Aid Society of Algoma v RM* (2001) 18 RFL (5th) 36.

[66] See, for example, *Children's Aid Society of Ottawa v MB*, [2007] OJ No 1054 (Sup Ct J); *Children's Aid Society of Ottawa v CW*, 2008 CanLII 13181 (ONSC); *Children's Aid Society of Hamilton v EO*

In addition, one fundamental and little-discussed difference between criminal and child protection proceedings is the role of counsel. Crown counsel have particular duties to the court and to the accused and have discretion to determine whether or not a charge proceeds. They are not employed by the police or under any duty to the police. In contrast, child protection counsel have a regular solicitor/client relationship with their agencies and are often employed directly by them. They have no discretion to refuse to pursue a case against a parent. Their ability to effectively prevent wrong-headed cases from proceeding is dependent upon the strength of the relationship between the individual lawyer and worker, and that between the legal department or firm and the agency as a whole. The rules of professional conduct provide the only limits on the agency lawyer's obligation to follow the worker's instructions. In this context, it is also worth noting that child protection counsel may not see themselves as having a responsibility to ensure the parents receive a fair trial, in contrast with Crown counsel vis-à-vis the accused. A further issue, at least in Ontario, is that agency counsel are paid considerably less than Crown counsel, raising questions about their general level of experience and skill.[67]

Another significant difference is the importance of counsel at the early stages of child protection cases. The pre-trial appearances determine the interim placement of the child, which can affect or even determine the subsequent relationship (or "attachment") between the child and parent. At the same time, an interim placement can enable a greater amount of information to be subsequently collected by the child protection agency through the child talking to foster parents, the parent and child interactions in access visits, and information gathered in the course of monitoring an interim supervision order (which can, for example, require the parent to attend counseling and participate in random drug tests, the results of which are shared with the agency). Also, and crucially, it is often if not always the parent's lawyer who seeks out relatives to care for the child as an alternative to agency care, who finds treatment programs for the parent, who counsels the parent on the importance of complying with interim orders, abstaining from drugs or separating from abusive partners, and in a multitude of other ways assists the parents in addressing the agency's and court's concerns about the care of the children. Perhaps most importantly, the interim placement of the child often determines whether the child will be ultimately placed with the parent or placed for adoption. Many child protection statutes set time limits on the amount of time a child can be removed from a parent's care before a "permanent" placement is made (either one or two years, depending on the age of the child); these rules do not apply when the child

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[2009] OJ No 5534 (Sup Ct); *CB v Alberta (Child, Youth & Family Enhancement Act, Director)*, 2008 ABQB 165; *Winnipeg (Child and Family Services) v LMT*, 1999 CanLII 14177 (MB QB).

[67] Professor Nicholas Bala raised this issue during his testimony before the Inquiry into Pediatric Forensic Pathology in Ontario on February 21, 2008. The transcript of Professor Bala's testimony can be found online: <http://mail.tscript.com/trans/pfp/feb_21_08/index.htm>.

is in the interim care of a parent or other relative. Therefore the presence or absence of counsel at the interim stage can set in motion a chain of events that can determine the outcome for both the parent and child.

A further critical issue is that there is no "default" in child protection proceedings. In criminal proceedings, a reasonable doubt results in an acquittal. The defendant has no obligation to present any case or respond in any way to the Crown's case. However, in child protection cases, the parent must respond to the agency's case and provide a written plan of care for the child. Failure to do so can result in the parent being prevented from participating in the proceedings. As long as the agency provides evidence to justify its position, the court can make a finding that the child is in need of protection and an order relating to the care of the child – including permanent removal – without having the agency's evidence tested through cross-examination and without hearing any evidence from the parent.[68] (Courts in Ontario are required to appoint counsel for the child in cases where there is no parent before the court,[69] but the child's counsel is not required to take a position adverse to the agency, depending on the child's wishes). If the parent does provide a written response and plan, the parent must then present evidence supporting his or her plan and responding to the agency's evidence in order to have any reasonable chance of success at trial, unlike a defendant in a criminal case who may not call any evidence at all and still receive the benefit of the reasonable doubt standard. The practical requirement that the parent participate meaningfully in the trial was a significant factor in the Supreme Court's determination that the principles of fundamental justice required the appointment of counsel for the mother in *G.(J.)*.[70]

The final difference we consider relevant to mention here is the difference in outcome. The vast majority of criminal cases are relatively minor. Of course, even a minor offence can bring with it significant consequences upon conviction: incarceration, loss of employment, loss of a driver's license, deportation for non-citizens, stigma, etc. In many child protection cases, the outcome is positive for the families: the children are returned (if they were apprehended), the family either obtains assistance for the issues leading to the agency's involvement or the involvement was found to be unjustified. However, in a great deal of cases the children are permanently removed from their parents' care, and many of those children are adopted. Those children and parents will usually never see each other again. Even prisoners with life sentences who are never granted parole can maintain some contact with their families. Moreover, a Crown wardship order with no order for access between the child and parent - which effectively cuts off all contact between the parent and child, and frees the child for adoption - can be based on far

[68] For example, see Family Law Rules, O Reg 114/99, s 10(5).

[69] See, *Child and Family Services Act*, RSO 1990, c C.11 at s 38(4)(b)(i).

[70] *G(J), supra* note 1 at paras 79-83.

less morally blameworthy behaviour than that which would lead to a life sentence in prison.

The distinctive attributes of child protection proceedings and the consequent differences between the legal context of child protection and criminal proceedings are rooted in the particular vulnerability of children, and the recognition that the safety of children is more important than the procedural rights of parents. We do not disagree with those guiding principles. However, within the legal context of child protection proceedings, parents are clearly relatively vulnerable. Taking that context into account, we would argue that this provides another ground for not assimilating the test for state-funded counsel in child protection to any more restrictive test arising in a criminal context. Moreover, even if the rights of children are properly given paramountcy in the legal context of child protection proceedings, that is no reason to impose a more restrictive conception of the state-funded counsel test on parents than was established in *G.(J.)*. In our view, the particular legal vulnerability of parents created by the legal context of child protection proceedings justifies a robust application of the right to state-funded counsel that, at a minimum, utilizes the less restrictive approach.

Having thus argued against assimilation of the test for state-funded counsel in child protection proceedings to a more restrictive criminal context-based test, we now turn to consider the relevance of legal aid plans and eligibility to applications of the test.

**(B) Legal Aid and State-funded Counsel in Child Protection**

Existing legal aid eligibility criteria should not serve as a benchmark or reference point for assessing either the indigency of an applicant for state-funded counsel or the scope of the right to be granted state-funded counsel. Permitting it to do so would ignore the severely limited scope of legal aid programs and also undermine the role of the right as recognized in *G.(J.)* and *Rowbotham*.

To begin with, the eligibility criteria used by Canadian legal aid plans can lay no claim to serving as proxies for the threshold of indigency in terms of affordability of counsel. Up-to-date comprehensive comparative data on legal aid plans in Canadian jurisdictions is difficult to obtain, but a 2002 Department of Justice report noted that the levels and means of calculating financial eligibility criteria varied from province to province.[71] Nevertheless, income cut-offs tended to be at or around the level of social assistance. It scarcely needs pointing out that it

[71] Canada, Department of Justice, A Profile of Legal Aid Services in Family Law Matters in Canada, *supra* note 15.

would be unheard of for social assistance rates to include sufficient discretionary income to afford legal counsel. Indeed, the general view is that social assistance rates may not even cover the basic necessities. While Canadian governments are reluctant to identify any single measure of the poverty line in Canada, Statistics Canada's low-income cut-off calculations (commonly known as LICO) have long served as the default measure of the poverty line. In its 2009 report, the National Council of Welfare noted that welfare incomes across the country were "consistently far below most socially accepted measures of adequacy...The welfare income of a single person was at best only 67% of the poverty line, using the Low-income cut-offs (LICOs) as the measure, and at worst was a mere 24%."[72] Welfare rates for single parents with one child were somewhat better, but still significantly below LICO in most provinces.[73] Total incomes of couples with two children on welfare (including provincial and federal child benefits) were below two thirds of the low-income cut-off in half the provinces, and at least $5000 less than LICO in all provinces.[74]

Moreover, in the over two decades since *Rowbotham*, legal aid funding has been drastically cut in numerous jurisdictions and current legal aid eligibility cut-offs have significantly depreciated in real terms. For example, the 2008 Review of Legal Aid in Ontario,[75] conducted by Professor Michael Trebilcock, noted that if the annual income guideline for a single-person family in 1996 had retained its real value, the guideline for 2007 would have been $16,316. Instead, the guideline was just $13,048. Moreover, this calculation disregards the 22% reduction in the guideline that was imposed in 1996 – for a total 45% reduction since 1995. Trebilcock summed up the situation in Ontario as follows:

> In important respects, the system has never fully recovered from the draconian cuts that were imposed on it in the first part of the 1990s .... These cuts entailed a capping of the overall provincial and federal allocations to the system, a reduction by half (from about 200,000 to 100,00) in the certificates issued, a significant reduction in the maximum hours allowable under certificates for various legal proceedings, and a 22 per cent cut in financial eligibility criteria for applicants for assistance. The financial eligibility criteria for legal aid certificates have not been adjusted since the 22 per cent reduction in 1996.
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> In the ten years that have elapsed since 1996, inflation has eroded the standard allowances by a further 23 per cent – a 45 per cent cut in real terms from the pre-1996 criteria - rendering the eligibility criteria seriously out of step with current cost of living levels and unrelated to any

[72] Canada, National Council of Welfare, Welfare Incomes, 2009 (Winter 2010, Volume 129) at vii-viii.

[73] *Ibid*, at 4-3, 4-4.

[74] *Ibid*, at 5-4.

[75] Ontario, Ministry of the Attorney-General, Report of the Legal Aid Review 2008 (Toronto: Ministry of the Attorney-General, 2008) [Doust Report].

> overarching conception of basic needs or a more general and coherent conception of poverty to which various social programs (including legal aid) might be anchored.[76]

The disconnection of legal aid eligibility criteria from any relevant measure of affordability of counsel is apparent beyond Ontario as well. A government-commissioned review of British Columbia's legal aid system concluded that:

> Legal aid administrators across Canada and beyond use financial eligibility criteria in an unprincipled manner to artificially reduce demand and balance budgets. This situation cannot be tolerated any longer.[77]

Alberta's legal aid review made the same point:

> Saskatchewan and Nova Scotia base their client financial eligibility on social assistance levels and Manitoba use low income cutoff (LICO) as its basis. The other Canadian plans do not appear to have an express rationale for their choice of financial eligibility. The ultimate decision as to who is in the client pool is value-laden and linked to what the decision-makers see as the role of government and of legal aid in today's democratic society.
>
> [D]etermining the actual percentage of Albertan households to be targeted or the items used to calculate net income, have been decided by the amount of available budget, rather than on any broader value-laden criteria. In other words, [financial eligibility guidelines] and funding constraints will determine who is eligible, not who should be eligible.[78]

For many years then, legal aid financial eligibility levels have ceased to provide any reasonable guidance for assessing indigency in terms of affordability of counsel. While legal aid plans still make an important contribution to access to justice, their eligibility criteria are simply a rationing device, divorced from any meaningful assessment of poverty, indigency or affordability of counsel.

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[76] *Ibid*, at 71-2.

[77] British Columbia, Ministry of the Attorney-General, Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia (Victoria: Ministry of the Attorney-General, March 2011) [Doust Report] at 50.

[78] Alberta, Ministry of Justice, 2009 Alberta Legal Aid Review (Edmonton: Ministry of Justice, 2009) at 26.

The fact that legal aid programs are failing to meet the constitutional standards set out in *G.(J.)*, even in the province where the case began, was noted by the authors of the 2007 New Brunswick legal aid review:

> To date, for budgetary reasons, New Brunswick Legal Aid has had to take an extremely narrow view of the implication of this right recognized by the Supreme Court of Canada in the J.G. case. The right is being limited essentially to the facts of the particular case of guardianship applications. This narrow view is not supported by the language the Supreme Court of Canada used in the decision and indicates an approach of extending rights only where there is direct and imminent constitutional pressure. In the absence of political leadership in developing poverty law programs for legal issues which engage s. 7 interests, it can be expected that courts will impose constitutional obligations in additional situations.[79]

Even if legal aid eligibility criteria hadn't depreciated so drastically, there would still be a problem in principle in using them as a reference point for determining affordability of counsel or the scope of the right to state-funded counsel – the problem being that from its very inception, the right to state-funded counsel was understood to be available despite a failure to qualify for legal aid. And just to put that in perspective, it is worth noting that Laura Koronow, the successful applicant for state-funded counsel in *Rowbotham*, had an annual income of $24,388 in 1984, which, using the Bank of Canada's inflation calculator, would have been the equivalent of $44,545.02 in 2007. In other words, her 2007 inflation adjusted income would have been three and a half times the legal aid guideline for a single-person, as calculated in the Trebilcock report. This income level is, of course, substantially higher than most of the applicants in the child protection cases reviewed above, and yet it was not considered sufficient to fund her trial (although, it should be noted, the trial was more complex and lengthy than most child protection matters – but, on the other hand, her counsel would only have been funded to attend for relevant parts).

If there is a need to reference some benchmark measure, then the LICO standard would seem more appropriate (and, indeed, Statistics Canada has also developed alternative measures, in particular the Market Basket Measure). Even so, the LICO should not be treated as a proxy for affordability of counsel because, again, it is not calculated to include capacity to cover unintended expenses of the magnitude of legal counsel for a trial - but it is at least a more credible starting point which may help to provide some much-needed perspective on an applicant's income level. Indeed, the British Columbia Legal Aid Commission recently recommended that applicants earning incomes at the StatsCan LICO levels automatically qualify for full coverage, while the "working poor", defined as those earning up to 200% of the

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[79] J Hughes and EL McKinnon, If There Were Legal Aid in New Brunswick... A Review of Legal Aid Services in New Brunswick, (Fredericton: Province of New Brunswick, 2007) at 14-15.

LICO levels, receive coverage with a sliding scale of contributions. [80] In relation to the situation in *Rowbotham*, for instance, the 1984 LICO for the relevant community size (500,000 persons or more) was $9,900 for a single-person family and $13,063 for a two-person family. Thus, Laura Koronow's income was still over double the LICO for a single person. Moving to the child protection context, the applicant in *Re V.* (more than twenty years later) had an income of $20,446, part of which was a student loan. The relevant LICO at the relevant time was $20,778.[81]

Moving beyond the issue of the specific appropriateness of legal aid eligibility criteria as a reference point for assessing capacity to afford legal representation, the broader issue that needs to be addressed is the role of the right to state-funded counsel for trial fairness in relation to legal aid in general and, more particularly, the role of the courts and judges in considering claims to state-funding. The ghost that stalks the recognition of a right to state-funded counsel if necessary to ensure a fair trial, when legal aid is not available, is the issue of whether legal aid plans might be found to violate the *Charter*. In recognizing the right to state-funded counsel, the courts in both criminal and child protection contexts have trodden a fine constitutional line in trying to uphold the right while not constitutionally impugning the shortcomings of legal aid. For instance, the appeal courts of both Ontario (in *Rushlow* and *R. v. Peterman*[82]) and Quebec[83] have made it clear that a court considering a claim to state-funded counsel in a situation where legal aid has been denied is not conducting either a judicial (administrative law) review or a *Charter* review of the legal aid decision. Rather, the court is conducting a case-specific inquiry into whether state-funding of counsel is needed in order to assure the fundamental justice of a fair trial. As Rosenberg J. stated in *Peterman*, in these cases "the court is fulfilling its independent obligation to ensure that the accused receives a fair trial."[84]

Of course, every such case could provide the basis for a *Charter* challenge to the limitation of the legal aid systems, but there appears to be little appetite among courts or applicants for upping the ante in that way. This caution is likely based in a tacit understanding that the Supreme Court may not be receptive to a more systemic challenge to the constitutionality of provincial legal aid plans. In *G.(J.)* itself, the Court clearly framed the right it was recognizing in case-specific terms that did not address the constitutional validity of New Brunswick's legal aid plan. As has been mentioned above, this was in part required by the earlier decision in *Prosper* in

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[80] Doust Report, *supra* note 75 at 50.

[81] This LICO table is available online: <http://www12.statcan.ca/census-recensement/2006/ref/dict/tables/table-tableau-18-eng.cfm>.

[82] 2004 OJ No 1758 (par 22).

[83] See *Quebec (Attorney General) v RC*, [2003] CanLII 33470 at para 131, (QC CA).

[84] *Peterman*, *supra* note 49.

which the Court had refused to establish an obligation upon governments to provide 24-hour duty counsel service and had signaled a general reluctance to recognize any positive obligations in relation to provision of counsel. Since then, the Court has delivered its decision in *R. v. Christie*,[85] which denied a blanket free-standing constitutional right to state-funded counsel in any civil matter. Since the right that the court denied in *Christie* was stated so broadly,[86] the decision does not foreclose the recognition of a more systemic right, perhaps arising from a direct challenge to the limits of a particular legal aid plan. However, a public interest challenge to the limits of the British Columbia legal aid plan was recently attempted by the Canadian Bar Association in British Columbia but was dismissed by the British Columbia Court of Appeal both for lack of public interest standing and for failure to disclose a reasonable claim.[87] The Supreme Court of Canada refused leave to appeal.[88] Under these circumstances, it would take a brave applicant or judge to convert a case-specific claim to state-funded counsel into a *Charter* challenge to a legal aid plan. There is the clear possibility that any such challenge might fail and, indeed, the danger that the case-specific avenue might be thrown into question in the process (a throwing out of the baby with the bath-water). Moreover, there is the disincentive of the additional time required for such a challenge – in the context of an impending child protection trial where delay is well-understood to be detrimental to the child, and undesirable to the parent.

The question then arises as to whether caution about the prospects for recognition of a more systemic right to adequate legal aid is a valid reason for taking a more restrictive approach to applying the case-specific right to state-funded counsel. Perhaps there is a valid strategic reason for applicants and judges to draw as little attention as possible to approvals of the case-specific right, but it is difficult to approve of such strategic considerations informing any particular determination of a claim to state-funded counsel. Courts considering such applications need to be focused on assuring trial fairness. Beyond that, and more practically speaking, judges considering case-specific claims ought to recognize that they will likely be ill-equipped by the evidence or arguments offered in the case before them to give adequate consideration to the broader policy and fiscal issues associated with a systemic-level analysis of state-funding of counsel. Consequently, judges considering case-specific claims should be very cautious about in any way taking into account those broader policy and fiscal issues. Rather, they should proceed on the basis that those issues were put before the Supreme Court of Canada in *G.(J.)* and were not regarded by that Court as anywhere near sufficient to deny a case-specific

[85] *R v Christie*, 2007 SCC 21 (CanLII) [*Christie*].

[86] For a discussion of problems with the decision in *Christie*, including the way in which the Supreme Court re-framed the claim, see Kerri A Froc, "Is the Rule of Law the Golden Rule? Accessing "Justice" for Canada's Poor" [2008] 87 Canadian Bar Review 459.

[87] *Canadian Bar Assn v British Columbia*, 2008 BCCA 92 (CanLII).

[88] *Canadian Bar Association v Her Majesty the Queen in Right of the Province of British Columbia, Attorney General of Canada and Legal Services Society*, 2008 CanLII 39172 (SCC).

right to state-funded counsel where necessary to ensure a fair trial, with Lamer C.J. stating that "the deleterious effects of the policy [of excluding child protection applications from legal aid coverage] far outweigh the salutary effects of any potential budgetary savings."[89] Consideration of those broader policy and fiscal issues is not part of the test set down by the Court for determining whether counsel ought to be ordered. In our view, unless and until a government respondent makes an express submission for a reconsideration of those broader issues, whether in the context of a case-specific claim or in some other case involving a relevant *Charter* challenge, and that is litigated up the court hierarchy, lower courts ought not to expressly nor impliedly consider those issues.[90] The *Charter* places the onus on the government to prove that these considerations justify the limited scope of legal aid assistance under section 1. Those cases where fiscal considerations have been referenced by the court have not included any evidence or analysis under s.1, as would be required in any reconsideration; instead, the courts seem to have placed the onus on the applicant to disprove the presumption that courts should not second-guess government decisions about legal aid. This is not how the issues should be adjudicated;[91] the focus of judges should thus be limited to the necessity of counsel to ensure a fair trial. As will be addressed further in the next section, this approach is also in keeping with the sense in which applications of the case-specific right are as much a question of judicial duty as they are of individual rights and governmental obligations.

The next section ultimately addresses the judicial context of claims for state-funded counsel in child protection proceedings. Before that, we consider the general issue of self-representation in relation to trial fairness and then give particular attention to the implications for self-representation of the social context of parents involved in child protection proceedings.

### (C) Self-representation, Social Context, Fair Hearings and Judicial Responsibility

A further justification for a less restrictive approach to claims for state-funded counsel in child protection matters is the underlying responsibility of judges to ensure a fair trial and the challenges posed by self-representation. In our view, judges may be becoming too ready to shoulder the burden of assisting self-represented litigants, at the expense of trial fairness. Moreover, it can be argued that in taking on

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[89] *G(J) supra* note 1 at para 98.

[90] Although it may be sensible for judges to follow the lead of the Quebec Court of Appeal in holding, in *RC, supra* note 83 at para 177, that, subject to agreement otherwise by the parties, the legal aid tariff ought to be the reference point for the costs of counsel.

[91] This is not least because, as the Quebec Court of Appeal pointed out in *RC, ibid*, at para 119, it may be that the social and economic costs of new trials (which are more likely to be ordered on a restrictive approach that may, in some cases, lead to violations of the fair hearing rights of accused) will outweigh the costs of a less restrictive approach to appointing counsel in the first place.

a burden they cannot adequately meet, judges are ultimately failing to live up to the distinctive duty they have to ensure fair trials.

### *i. Self-representation and Fair Hearings*

Although there is a lack of comprehensive data,[92] it is generally accepted that self-representation in Canadian courts is on the rise. To its credit, the Canadian court system has taken a leading role in recognizing and addressing the challenges of self-represented litigants. In public remarks, the Chief Justice of Canada has highlighted the issue of access to justice barriers and noted that increasing numbers of litigants appear to be self-representing because they cannot afford legal counsel.[93] As the Chief Justice remarked, while self-representation may at least be better than giving up on one's rights altogether (or having to spend all of one's financial resources on counsel), unrepresented litigants pose challenges for judges and do not necessarily achieve justice:

> [U]nrepresented litigants – or self-represented litigants as they are sometimes called – impose a burden on courts and work their own special forms of injustice. Trials and motions in court are conducted on the adversary system, under which each party presents its case and the judge acts as impartial decider. An unrepresented litigant may not know how to present his or her case. Putting the facts and the law before the court may be an insurmountable hurdle. The trial judge may try to assist, but this raises the possibility that the judge may be seen as "helping", or partial to, one of the parties. The proceedings adjourn or stretch out, adding to the public cost of running the court. ... Different, sometimes desperate, responses to the phenomenon of the self-represented litigant have emerged. Self-help clinics are set up. Legal services may be "unbundled", allowing people to hire lawyers for some of the work and do the rest themselves. The Associate Chief Justice of the British Columbia Provincial Court is quoted as saying this is "absurd", not unlike allowing a medical patient to administer their own anesthetic.[94]

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[92] The recent report of the Ontario Civil Justice Reform Project, conducted by the Honourable Mr. Justice Coulter A Osborne, addressed the phenomenon of unrepresented litigants and noted that "...no formal study has been conducted [in Ontario] on the number of unrepresented litigants, their socioeconomic profile, the nature of the legal problems they face and the gaps in serving them. I am advised that the Ministry of the Attorney General is undertaking efforts to collect statistics on the number of unrepresented civil litigants in Ontario courts." The report goes on to mention the handful of studies conducted in other jurisdictions (Alberta, British Columbia, Nova Scotia and Quebec). Ontario, Ministry of the Attorney General, Ontario Civil Justice Reform Project Report, 2007. Online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/080_unrepresented.asp>.

[93] Remarks of the Right Honourable Madam Chief Justice Beverley McLachlin, P.C., The Challenges We Face (Presented at the Empire Club of Canada, Toronto, March 8, 2007) available on the website of the Supreme Court of Canada <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>.

[94] *Ibid*, and citing Associated Chief Justice Dennis Schmidt, as quoted in Tracey Tyler, "The dark side of justice", Toronto Star, March 3, 2007.

For its part, in 2006 the Canadian Judicial Council released a Statement of Principles on Self-represented Litigants and Accused Persons which identifies responsibilities of parties, lawyers, court administrators, judges, and government agencies.[95] These Principles are noteworthy for their attempt to provide guidance to judges who face the difficult task of accommodating the needs of self-represented litigants within judicial obligations of neutrality and impartiality. For instance, the Principles include "Promoting Equal Justice", which is elaborated as follows:

> STATEMENT: Judges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation.
>
> PRINCIPLES:
>
> 1. Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.
> 2. Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.
> 3. Where appropriate, a judge should consider engaging in such case management activities as are required to protect the rights and interests of self-represented persons. Such case management should begin as early in the court process as possible.
> 4. When one or both parties are proceeding without representation, non-prejudicial and engaged case and courtroom management may be needed to protect the litigants' equal right to be heard. Depending on the circumstances and nature of the case, the presiding judge may:
>
> (a) explain the process;
> (b) inquire whether both parties understand the process and the procedure;
> (c) make referrals to agencies able to assist the litigant in the preparation of the case;
> (d) provide information about the law and evidentiary requirements;
> (e) modify the traditional order of taking evidence; and
> (f) question witnesses.[96]

These principles clearly enable what can be valuable judicial assistance for self-represented litigants. But, accumulated case law limits how far judges can go with this assistance. Judges are only obliged to offer reasonable assistance and are

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[95] Available online at: <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf>.

[96] Canadian Judicial Council, News Release, "Canadian Judicial Council Issues Statement of Principles on Self-Represented Litigants and Accused Persons" (12 December 2006) online: Canadian Judicial Council <http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2006_1212_en.asp>.

not expected to provide the level of assistance that might be expected of counsel – indeed, a judge is not allowed to become an advocate or tactical advisor.[97]

Of course, as the Principles acknowledge, and as Chief Justice McLachlin referred to in her extra-judicial remarks, judges are not the only means by which a self-represented litigant might improve his or her prospects of ensuring they obtain a fair hearing. In recent years, a number of Canadian jurisdictions have made concerted efforts to provide front-end support to people contemplating self-representation. These efforts have probably gone furthest in British Columbia, with the establishment of a Supreme Court Self-help Centre and the piloting of civil justice access centres (at the same time though, prior to these initiatives, the British Columbia government had made deep cuts to legal aid programs and clinics).[98]

But it is unlikely that either front-end self-help assistance or judicial assistance, or even both, can do anything more than mitigate the barriers to access to justice that inevitably face self-represented litigants, particularly, as in child protection, when the opposing side (or sides) have state-employed counsel backed-up by state-agency resources. Indeed, the inherent inequality and disadvantage of such circumstances was noted by Chief Justice Farris in *R. v. Ewing and Kearney*,[99] which is one of the main authorities (and was cited in *Rowbotham*) for contemporary recognition of the inherent power of judges to appoint state-funded counsel where necessary for trial fairness. The Chief Justice (joined by Banca J.) was in fact in dissent in the case on the grounds that he appeared to hold that representation by counsel is always necessary to assure trial fairness, whereas the majority (led by Seaton J.) held that counsel was not always necessary to a fair trial and so need only be appointed when the necessity arose. But the following words of Farris C.J., addressing the situation of the two 18-year-olds accused of cannabis possession, neatly sum up the nature of the inherent inequality and disadvantage of self-represented parties in 'prosecutorial'-type proceedings:

> Our criminal justice is administered under the adversary system; that is to say, a system where when a conflict arises between a citizen and the state the two are to be regarded as adversaries. The conflict is to be resolved by fighting it out according to fixed, sometimes rather arbitrary, rules. The tribunal trying the matter settles the dispute on the basis of only such evidence as the contestants choose to present. In such a proceeding there are rules of procedure and rules of evidence that can only be properly understood and applied after years of training and experience. For this reason, the Crown in this case, as it does in most criminal cases, employs

[97] See generally: *Regina v McGibbon* (1988), 45 CCC (3d) 334 (Ont CA); *Regina v Sechon* (1996), 104 CCC (3d) 554 (Que CA); *Regina v Tran* (2001), 156 CCC (3d) 1 (Ont CA).

[98] Doust Report, *supra* note 75.

[99] *R v Ewing and Kearney*, (1974) 49 DLR (3d) 619 [*Ewing*].

> counsel who are trained in the law. This means not only trained in the rules of evidence and rules of procedure but knowledgeable in the art of advocacy, in the marshalling of facts and in the case law. The prosecutor not only has this advantage but he has the resources of the state and the power of a police force behind him. Anyone who has prosecuted an assize or who has conducted prosecutions in any court knows what it means to have such power available. Into such an arena two 18-year-old youths are projected, totally unequipped by experience or education to defend themselves against such a powerful adversary. In my opinion, it is unrealistic in the extreme to believe that in such a contest these accused can be assured of a fair trial without the assistance of counsel.[100]

Chief Justice Farris then went on to address the capacity of judges to assist in overcoming this inequality and disadvantage:

> It is equally unrealistic to believe that the assistance and guidance of the trial judge are adequate substitutes for representation by counsel. It is not the function of a trial judge to act as counsel for either party. Further, without briefing, interviewing of witnesses and preparation, the benevolence of the trial judge cannot be equated with the dedication of counsel.[101]

It is clear from *G.(J.)* that the Supreme Court of Canada would side with the *Ewing* majority's position that counsel is not necessarily always required to ensure trial fairness. However, it is worth noting the Ontario Court of Appeal's decision in *Rushlow* to order a new trial with state-appointed counsel even where the trial judge had conducted a "model" trial in terms of the assistance provided to the self-represented accused. The broader point is that counsel is crucial to the proper functioning of the adversarial system. The Supreme Court itself has recently drawn attention to the integral role that the adversarial system plays in underwriting fundamental justice in Canadian courts. In *Charkaoui v. Canada (Citizenship and Immigration)*,[102] the Court was called on to review whether the process for preventative detention in an anti-terrorism context conformed to the principles of fundamental justice. The Court became particularly concerned that the process for judicial review of preventative detention orders limited the participation rights of persons subject to the orders and also limited the information available to them. For the Court, these limitations undermined the effectiveness of the adversarial system and, in so doing, imperiled the principle of fundamental justice that judges render decisions according to relevant facts and law. In reaching this conclusion, the Court contrasted the operation of the inquisitorial and adversarial systems of dispute

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[100] *Ibid*, at para 6.

[101] *Ibid*, at para 7.

[102] *Charkaoui v Canada* (Citizenship and Immigration), [2007] 1 SCR 350 [*Charkaoui*].

resolution, as follows, emphasizing the need for judges to receive adequate, adversarial, submissions on facts and law:

> There are two types of judicial systems, and they ensure that the full case is placed before the judge in two different ways. In inquisitorial systems, as in [page383] Continental Europe, the judge takes charge of the gathering of evidence in an independent and impartial way. By contrast, an adversarial system, which is the norm in Canada, relies on the parties -- who are entitled to disclosure of the case to meet, and to full participation in open proceedings -- to produce the relevant evidence. The designated judge under the *IRPA* does not possess the full and independent powers to gather evidence that exist in the inquisitorial process. At the same time, the named person is not given the disclosure and the right to participate in the proceedings that characterize the adversarial process. The result is a concern that the designated judge, despite his or her best efforts to get all the relevant evidence, may be obliged -- perhaps unknowingly -- to make the required decision based on only part of the relevant evidence. As Hugessen J. has noted, the adversarial system provides "the real warranty that the outcome of what we do is going to be fair and just" (p. 385); without it, the judge may feel "a little bit like a fig leaf" (Proceedings of the March 2002 Conference, at p. 386).[103]

Obviously enough, preventative detention proceedings are a very distinct context for applying principles of fundamental justice, but the Court takes the position that the same basic principles of fundamental justice apply to all judicial contexts. And it is generally acknowledged that the same basic problem of limitations on the capacity of a party to receive and provide full information and arguments, and to fully participate, can arise for self-representing parties in any judicial context – only, as compared to *Charkaoui*, the limitations are practical, not legal. Indeed, these are precisely the limitations to which Chief Justice McLachlin drew attention in her extra-judicial remarks, quoted above. Specific instances of these limitations can be found in the child protection context. For example, although self-representing parents are entitled to disclosure, they are not provided with it as a matter of course and instead need to request it. Being ignorant of basic legal procedure, the anecdotal evidence is that they often do not seek disclosure and, moreover, judges may not always be aware that disclosure has not been obtained. At the same time, and as discussed in section (C), above, the child protection context lacks some of the protective safeguards in relation to evidence gathering and admissibility that exist in the criminal context, thus potentially further disadvantaging the parent – and even before other disadvantages associated with the social context of child protection claims are factored in. Consequently, in our view, judges in child protection matters are entitled to be quite skeptical about the potential for parents to effectively participate in child protection hearings without legal representation, even with judicial assistance. But the challenges faced and posed by

[103] *Ibid*, at para 50.

self-representing parents in child protection proceedings go far beyond this particular procedural issue. The social context of parents involved in child protection proceedings may often leave them particularly ill-suited to adequately making their own case. This is discussed in the next section.

### *ii. Social Context*

There are important social factors which affect the ability of parents to adequately represent themselves without counsel. Parents in child protection proceedings are often disadvantaged in some or many ways: they are often poor, poorly educated, often racialized, members of immigrant communities, have low literacy levels, experienced abuse and/or neglect by their own parents, have substance abuse problems, and many have diagnosed or undiagnosed mental illness such as depression and post-traumatic stress disorder. The Supreme Court has noted the particular social context of families involved in child protection proceedings in the case of *Winnipeg Child and Family Services v. K.L.W.*:

> A proper description of the general context of this case cannot ignore the frequent occurrence of child protection proceedings involving already disadvantaged members of society such as single-parent families, aboriginal families and disabled parents.[104]

Also, many parents appearing as respondents are single mothers and there is reason to believe that their chances of securing state-funding of counsel, whether through legal aid or otherwise, may be detrimentally affected by systemic gender discrimination. This issue was directly raised in the 2007 review of legal aid in New Brunswick, as follows:

> It is also evident that legal aid is currently being provided in an extremely gendered fashion. The majority of poor people in New Brunswick (as elsewhere) are female, but most legal aid dollars are expended on men. This is because most legal aid is provided in the criminal law area, and vastly more men than women are involved in the criminal justice system. It is very well understood that the legal needs of women are different from the legal needs of men, and catering to the one and not the other is difficult to reconcile with the equality guarantee contained in s. 15 of the *Charter*.
>
> The Supreme Court in J.G. gave governments warning through a concurring minority opinion that the s. 15 issue was on its radar. Governments will ignore this warning at their peril. Again, it is likely that the continued deprivation of legal assistance to women facing poverty will lead to an expansion of constitutionally required areas of state-funded

[104] 2000 SCC 48, [2000] 2 SCR 519, at 72.

> counsel unless there is evidence of a political will to deal with the problem.[105]

As the Supreme Court noted in *G.(J.)* as well, self-representing parents will inevitably be dealing with the profoundly stressful experience of having had their child removed or threatened with removal by the state.

There will thus be any number of general and specific ways in which the multi-faceted social context of parents in child protection proceedings will create significant barriers to effective self-representation, beyond the general difficulty that any lay person would be expected to have in navigating legal proceedings. Given the tendency for courts to criticize the financial decisions made by parents seeking state-funded counsel in many of the post-*G.(J.)* cases, discussed above, it is worth exploring the specific relevance to that issue of the social context of parents involved in child protection proceedings. The most immediate relevance is that low income parents will have little, if any, room in their household budgets for unexpected expenses, particularly expenses in the magnitude of legal counsel costs. Moreover, and as attested to by a recent report of the government-sponsored Canadian Taskforce on Financial Literacy, there is a general lack of financial literacy in Canada.[106] While the ability to keep track of a budget is about the same as between higher and lower income groups, the ability to make ends meet and the ability to plan ahead are identified in the report as greater challenges for low income, Aboriginal and new immigrant households than for high income households. One consequence of this, in our view, is that any judicial assessment of a parent's budgeting or prioritizing of expenses needs to be informed by an understanding that a significant proportion of people lack financial literacy. A self-representing parent should not be held to a standard of financial management that a significant proportion of the population at large could not meet. Judges therefore need to be aware that they may lack the capacity to properly situate themselves within the financial literacy context of the parent before them. Further, judges themselves may lack sufficient financial literacy and so may need to seek guidance from objective financial management benchmarks or financial professionals. It is interesting to note, for instance, that in *T.L.* the judge had the benefit of an accountant's report on the household's financial affairs (arranged by *amicus* counsel).

Beyond the issues of low income and low financial literacy, the high rates of mental illness and cognitive delay among parents involved in child protection proceedings is of particular relevance to the assessment of a parent's financial

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[105] Doust Report, *supra* note 77 at 15. This references the discussion of child protection as an issue affecting gender equality in Justice L'Heureux-Dubé's judgment in *G(J)*, *supra* note 1 paras 113-115.

[106] Taskforce on Financial Literacy, Canadians and Their Money: Building a brighter financial future (2009) online at <http://www.financialliteracyincanada.com/report/report-toc-eng.html>.

position and prioritizing. The link between mental illness and poor financial judgment has been made repeatedly.[107] Mildly cognitively impaired people also have increased financial impairment.[108] A report by the British Royal Society of Psychiatrists on the connection between mental illness and debt noted that:

> One in four people will experience a mental health problem during their life... It is difficult to disentangle the inter-relationship between debt and mental health, but the links are clear. Being in debt can negatively affect a person's mental health, while living with a mental health problem increases the likelihood of falling into debt.[109]

The World Health Organization notes that mental health issues are twice as common among the poor as they are among the rich, and suggests that the "best evidence indicates that the relationship between mental ill-health and poverty is cyclical: poverty increases the risk of mental disorders and having a mental disorder increases the likelihood of descending into poverty."[110] According to the 2008 Canadian Incidence Study, which examines the incidence of reported child abuse and neglect in Canada, mental health issues was one of the most frequently noted risk factors in substantiated maltreatment investigations.[111] Mental health problems experienced by the mother have also been identified as one of the most critical variables in predicting increased abuse potential. We also note that there may be many more parents in child protection cases with mental health issues than have been identified, since many people with known mental health problems may be reluctant to identify them, due to concerns about the possible response of child protection officials.[112]

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[107] See, for example, Daniel C Marson, J.D., Ph.D., Robert Savage, Ph.D., & Jacqueline Phillips, Ph.D., "Financial Capacity in Persons with Schizophrenia and Serious Mental Illness: Clinical and Research Ethics Aspects" (2006) 32:1 Schizophrenia Bulletin, 81–91, which noted that "financial capacity is commonly impaired" in individuals with serious mental illness (at 81).

[108] H R Griffith et al, "Impaired financial abilities in mild cognitive impairment: A direct assessment approach" 60:3 Neurology (February 11, 2003), 449-457.

[109] Mind, In the Red: Debt and Mental Health (Mind: London, 2008) available online at <http://www.mind.org.uk/assets/0000/9121/in_the_red.pdf>, at 4.

[110] World Health Organization, Information Sheets, Breaking the Vicious Cycle of Ill Health and Poverty available online <http://www.who.int/mental_health/policy/development/en/>.

[111] Canada, Public Health Agency of Canada, Canadian Incidence Study of Reported Child Abuse and Neglect 2008 (CIS-2008): Major Findings (Ottawa: Public Health Agency of Canada, 2010) available online at: <http://www.cwrp.ca/sites/default/files/publications/en/CIS-2008_Child_Family_Characteristics.pdf>, at 2.

[112] Research Reviews on prevalence, detection and interventions in parental mental health and child welfare: Summary report Professor Gillian Parker, Dr Bryony Beresford, Ms Susan Clarke, Ms Kate Gridley, Ms Rachel Pitman, Ms Gemma Spiers, Social Policy Research Unit, Kate Light Centre for Reviews and Dissemination, July 2008, The University of York <http://www.york.ac.uk/inst/spru/research/pdf/SCIESummary.pdf>.

Given these various and potentially intersecting social context conditions, in our view, courts must be extremely wary of considering evidence of financial mismanagement or failure to prioritize when considering *G.(J.)* applications. Also, in our view, this is a further reason to prefer the less restrictive approach to appointing state-funded counsel. We note, of course, that those people who do meet legal aid eligibility requirements – people on social assistance, particularly – may also have a history of poor financial choices. These choices are never considered by the court and do not disentitle them to legal aid.

At this point it is also worth addressing the concern arising from the cases subsequent to *G.(J.)* that parents are often in the position of having to self-represent on the application for appointment of state-funded counsel. All of the social context issues mentioned here are as relevant to the (in)ability of parents to adequately present their own case in the substantive hearing as they are to their ability to do so at the hearing on the application for state-funded counsel. Indeed, it is likely no coincidence that all of the parents who have succeeded in having state-funded counsel appointed in reported child protection proceedings, including in *G.(J.)* itself, were in fact represented by *amicus*, duty or *pro bono* counsel. Representation on the application has not been a guarantee of success, but lack of representation correlates with failure. Given the obvious detrimental impact that a failure to have counsel appointed may have on the ability of the parent to present relevant evidence and arguments at the substantive hearing, it is our view that courts should at least be insisting on appointment of state-funded counsel for the hearing of the applications for appointment of state-funded counsel at trial. This brings us back to the issue of the particular responsibility of judges to ensure the fairness of trials, with which we conclude this section.

### *iii. Judicial responsibility*

It is firmly established that judges have both the power and the responsibility to ensure that child protection hearings are fair and that state-funded counsel is made available, where necessary – subject, of course, to the interests of the child(ren) in avoiding any associated delay in proceedings. The power to order state-funding of counsel in order to ensure a fair trial resides both in the inherent common law power of courts and judges and in s. 7 of the *Charter*. The responsibility to ensure a fair trial is an ages-old tenet of the common law adversarial system, is entrenched in modern human rights guarantees and, indeed, is an integral aspect of judicial ethics. As such, the responsibility falls squarely on judges themselves. Unfortunately, at times, it seems that judges, in considering that responsibility, are rather too conscious of imposing costs on the public purse – instead of ordering counsel, they will instead appear to try to make do, offering what assistance they can. This is understandable, but also unacceptable. 'Making do' is not a principle of fundamental justice – it is a fundamental injustice. There can hardly be a principle of more importance to judges than ensuring the fairness of trials. Judges ought to be the first ones to point out the

problems posed by a lack of counsel and, indeed, most judges do go to great pains to emphasize the potentially detrimental consequences of self-representation and to facilitate referrals to counsel. But judges ought also to be the last ones to accept involuntary self-representation as adequate – so long, at least, as the traditional adversarial system is maintained. In our view, if child protection matters prosecuted by the state ultimately fall to be addressed in the adversarial trial court system, then the cost of counsel is, quite simply, the cost of doing business.[113]

Another way to put this is to emphasize the sense in which the responsibility to ensure trial fairness is a distinctively judicial duty that brings with it a judicial role that is notably different to the role which judges generally play in overseeing compliance with *Charter* rights. With respect to, for example, the *Charter*'s individual right to freedom of expression, judges are typically playing the role of the impartial umpire, defining and applying the dictates of the constitutional guarantee to disputes between governments and individuals. Apart from the judicial duty to act as a responsible guardian of the constitution, the judge, in his or her institutional capacity, is not implicated in the decision in any other way. In contrast, with respect to the *Charter*'s guarantee of fundamental justice and, as part of that, fair hearings and, where necessary, state-funded counsel, the judge is not merely umpiring the dispute. The judge's institutional role as a judge, and the judge's specific and direct duty to ensure that the trials over which he or she presides are fair, is also engaged. In such situations, the judge is not merely under a duty to be a guardian of the constitution, but also a guardian of the courts and the administration of justice. This added duty gives a distinctive dimension to the judicial role in addressing case-specific claims to state-funded counsel. In our view, proper regard for that distinctive duty and role entails a robust unwillingness to compromise trial fairness or, in other words, a refusal to just 'make do.'

This is not to say that there cannot be a reasonable justification for operating a child protection system involving the courts that does not always provide state-funded counsel to parents who are unable to afford representation. Perhaps anti-terrorism and national security are not the only contexts in which attenuating the fundamental principle of trial fairness can be justified. But if there is such a justification then, under the *Charter*, and as with the anti-terrorism and national security contexts, the onus is upon governments to offer and prove it. Until that occurs, the onus is on judges to shoulder their responsibility to ensure that the trials they conduct are meaningfully fair. This entails a clear-headed assessment of whether state-funded counsel is required – an assessment that neither underestimates the challenges that self-representing parents face, nor overestimates the capacity of judges to assist in overcoming those challenges.

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[113] Some courts and judges have recognized the overriding importance of representation in serious cases of deprivation of liberty. For example, the Ontario Court of Appeal has a program of amicus representation of litigants in mental health and inmate appeals; we are aware of some other judges who have a practice of making *Rowbotham* or *amicus* appointments in all murder trials with unrepresented defendants.

### 3. A Contextual Approach to State-funded Counsel in Child Protection Cases

The reported decisions on the appointment of counsel following *G.(J.)* and preceding *T.L.* import a number of inappropriate requirements and assumptions into the test for state-funded counsel, creating a potentially more restrictive scope for the associated right. The decisions of the trial and appeal courts in *T.L.*, and the Ontario Court of Appeal decision in *Rushlow* rejected the notion that state-funded counsel should only be ordered in exceptional circumstances, while also disregarding concerns about the impact on legal aid systems or the financial choices of the applicants. Through our consideration of the various concerns connected to the more restrictive approach, we have argued that the less restrictive approach is strongly preferable. In our view, it is much more in keeping with the *Charter* requirement for fundamental justice, the trial court's common-law duty to ensure trial fairness and the direct and distinct ethical responsibilities of judges in relation to that duty, especially given the general challenges faced and posed by self-represented litigants. A less restrictive approach also demonstrates an appreciation of the legal context of child protection proceedings and the social context of the applicants in these cases. The following are some suggestions for trial judges faced with unrepresented parents in child protection cases which we believe are supported by our preceding analysis and the decisions in *Rushlow* and *T.L.*

#### (A) Inquiry as to absence of counsel

Inquire as to why the person is not represented. Ensure that the litigant genuinely does not wish to have a lawyer. If it appears that the litigant does wish to have counsel, inquire as to whether they have sought legal aid. If legal aid has been denied for financial eligibility, explain that the litigant has the right to state-funded counsel if he or she cannot afford counsel. Consider whether to adjourn for an appeal of the legal aid decision. (Where trial is approaching, and where the litigant's financial situation has not changed, adjourning for this purpose may not be desirable; instead, courts should consider proceeding with the *G.(J.)* application under the assumption that the legal aid appeal would fail.) This approach was taken by the trial judge, Justice Pomerance, in *Rushlow*.

#### (B) Adjourn to enable application; appoint counsel for the application itself

Adjourn the matter to allow the *G.(J.)* application. Advise the litigant of the information and steps necessary for the application (such as service on the Attorney General and provision of financial records). Ask duty counsel to assist the parent in making a *G.(J.)* application; if appropriate, appoint counsel for the limited purpose of the application. This would avoid the absurdity of requiring a parent who may not be capable of adequately marshalling evidence and making legal argument at trial to

marshal evidence and make legal argument at the motion, a problem that was referred to in *Re V.* and *R.F.*

### (C) Accommodation of technical deficiencies

If the applicant does not have counsel on the motion, and the application is technically deficient (e.g. the Attorney General was not served, the financial information is inadequate), adjourn the matter with instructions to the applicant on how to remedy the deficiency. Child protection counsel can also assist, for example by ensuring the documents are properly served on the Attorney General.

### (D) Financial eligibility test

#### *i. Onus and evidence*

The financial eligibility question should be whether the parent or accused person has sufficient means to pay for counsel, given their particular circumstances at the time of the application (including income, debts, family size, location, and any other relevant factor). Consideration should also be given to approving the cost of a review of household finances by an accountant or other professional. Any suggestion that *G.(J.)* applicants bear a heavier onus than this is not appropriate.

#### *ii. Presumptive entitlement*

When considering the *G.(J.)* application, evidence that the applicant's income falls below an objective benchmark should create a presumption of indigence, shifting the onus to the Attorney-General to rebut this through evidence of an ability to afford counsel or deliberate manipulation of finances to avoid the requirement to pay for counsel. This would be consistent with the findings and recommendations of some legal aid plan reviews. In terms of establishing an objective benchmark, we note that the British Columbia legal aid review suggested that legal aid eligibility be tied to the Statistics Canada Low-Income Cut-Off (LICO). In order to be sufficient to pay for legal representation as well as meeting basic needs, however, a parent's income would actually have to be significantly higher than these levels. Therefore a better additional reference point could be entitlement to means-tested government subsidies or financial assistance such as student loans, subsidized housing, low-income energy assistance programs,[114] or subsidized daycare.

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[114] The Ontario Hydro program, for example, provides assistance for families whose income is at or below LICO plus 15%, see online at:
<http://www.hydroottawa.com/corporate/index.cfm?lang=e&template_id=330>.

#### *iii. Considerations of legal aid criteria and impact*

Legal aid eligibility criteria should not be referred to in determining what income is needed to pay for counsel. The impact on the legal aid plan or government in ordering state-funded counsel should likewise be disregarded. These principles have been emphasized in a number of judgments, including *Rushlow*, *Peterman* and *T.L.*

#### *iv. Financial management evidence*

Evidence of poor financial management, including purchases and debts accumulated after the commencement of the proceeding, should not be relevant to the determination of financial eligibility unless the government or Crown satisfies the court that the applicant has deliberately manipulated his or her funds so as to avoid paying for counsel. This is the standard set by the Ontario Court of Appeal in *Rushlow* and is, we believe, appropriate in the context of parents who may well have mental health or cognitive vulnerabilities affecting their financial capacity. Any argument concerning the morality of the applicant's behavior or lifestyle (such as using income to pay for drugs) should not be entertained, with the exception noted above.[115]

### (E) Judicial capacity for assistance

The trial judge's assessment of his or her ability to assist the applicant in conducting the trial should not be considered determinative of the application, as the Ontario Court of Appeal emphasized in *Rushlow.*

### (F) Renewal of application if circumstances change

If the applicant does not satisfy the court that they are unable to afford counsel, and there is some question as to whether they might satisfy the *G.(J.)* test in future, consider advising the applicant of their right to renew the application should their circumstances change or they obtain the necessary financial evidence. This was done in *Re V.* and reflects the reality that circumstances, especially of the poor, may change rapidly.

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[115] We note that the Supreme Court of Canada unanimously rejected the Government of Canada's assertions that the fact that drug addicts were engaging in "immoral" activity by using drugs in the Insite clinic disentitled them to the protections of the Charter. The Court noted that the morality of the activity in question was irrelevant for the s.7 analysis. The Court also rejected the argument that the addicts "chose" to break the law, emphasizing that addiction is a disease. *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 97 – 106. We would argue that any attempt to characterize a parent's inability to pay for legal services due to financial mismanagement as evidence of bad character and therefore justifying denial of state-funded counsel, except where there is evidence of a conscious plan to manipulate assets in order to avoid paying for counsel, should be rejected on similar grounds.

## CONCLUSION

The right to state-funded counsel in child protection proceedings recognized by the Supreme Court of Canada in *G.(J.)* is aimed at ensuring a fair hearing for the parents involved in those proceedings. But if that aim is to be fulfilled, the test for determining whether to appoint state-funded counsel must itself be fair. As we have identified in this article, numerous cases since *G.(J.)* have made the test more restrictive than its origins and, in our view, unfair. The recent decision in *T.L.* has offered a break from those cases and, in our view, represents a less restrictive approach to the issues that have arisen in the post-*G.(J.)* cases. As we have argued in this article, this less restrictive approach is fairer to parents involved in child protection proceedings and also more in keeping with the role of the right to state-funded counsel and the responsibility of judges to ensure fundamental justice. But the less restrictive approach is not just fairer to parents. Also, and significantly, it is fairer to the children of those parents.

The focus of child protection legislation in Canada is on the child, not the parent; the overriding consideration is always what is in the best interests of the child. The wrongful removal of a child from a parent is obviously contrary to the interests of that child, but lack of adequate representation can in some cases lead to just that result. Even if removal is warranted, parents who are represented are more likely to present successful plans for the care of the child by members of the child's family or community – an outcome, which is often preferable to placement in foster care and/or eventual adoption. Courts have confirmed that mental illness, cognitive delay, and poverty are not sufficient reasons for removing children from their parents;[116] parents facing those challenges should still be given the opportunity to demonstrate that they can care for their children. A robust approach to ensuring state-funded counsel for low-income parents in child protection cases will serve to promote not only trial fairness, but also positive outcomes for children and families.

[116] *Children's Aid Society of Toronto v B-H(R)*, 2006 ONCJ 515 (CanLII); *Children's Aid Society of Kingston v FR* (1975), 23 RFL 391 (Ont Prov Ct – FD).